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No. _____

In the Supreme Court of the United States

AGNES BERNARDO, et al.,

Petitioners,

v.

PLANNED PARENTHOOD FEDERATION OF AMERICA. et al.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioners Agnes Bernardo, Pamela Colip, and Saundra Duffy-Hawkins (collectively "Bernardo") filed suit against Planned Parenthood Federation of America ("PPFA") and Planned Parenthood of San Diego and Riverside Counties ("PPSDRC") (collectively"PPFA") under Cal. Bus. & Prof. Code ("B.P.C.") §§17200 & 17500, alleging that PPFA makes false and misleading statements about breast cancer risk, and the evidence relating to that risk, in connection with the provision of abortion services to women in the State of California. In lieu of an Answer, PPFA filed a Motion to Strike pursuant to Cal. Civ. Proc. Code ("C.C.P.") §425.16. Bernardo responded by providing evidence in support of her claims as required by the statute. Despite Bernardo's showing, the Superior Court of the State of California, County of San Diego, granted PPFA' motion to strike her Complaint and, later, ordered Bernardo to pay $77,835.25 in fees. The Court of Appeals of the State of California affirmed, awarding further costs and fees to PPFA. The Supreme Court of the State of California denied Bernardo's Petition For Review.

Bernardo now petitions this Supreme Court of the United States for a writ of certiorari. The questions presented are as follows.

1. Does C.C.P. §425.16, Which Authorized the Dismissal of Bernardo's Complaint and Award of Attorneys Fees and Costs, Violate Bernardo's Constitutional right to petition.

2. Does C.C.P. §425.16, Which Authorized the Dismissal of Bernardo's Complaint and Award of Attorneys Fees and Costs, Violate Bernardo's Constitutional right to Due Process of Law.

3. Does C.C.P. §425.16, Which Authorized the Dismissal of Bernardo's Complaint and Award of Attorneys Fees and Costs, Violate Bernardo's Constitutional right to Equal Protection.

PARTIES TO THE PROCEEDINGS

The Petitioners are Agnes Bernardo, Pamela Colip, and Saundra Duffy-Hawkins. Petitioners have no corporate affiliations.

The Respondent if Planned Parenthood federation of America and Planned Parenthood of San Diego and Riverside Counties. Petitioner makes no representations as to Respondent's corporate affiliations.

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OPINIONS BELOW

The only published report of the opinions rendered in this case is the decision of the California Court of Appeal reported as follows: *Bernardo v. Planned Parenthood Federation of America*, 115 Cal. App.4th 322, 9 Cal.Rptr.3d 197, 4 Cal. Daily Op. Serv. 846, 2004 Daily Journal D.A.R. 1025 (Cal.App. 4 Dist. Jan 28, 2004) (NO. D040186, D040866)

JURISDICTIONAL STATEMENT

Bernardo petitions for writ of certiorari with respect to the decision and order striking her claims pursuant to C.C.P. §425.16 entered by the Superior Court of the State of California, County of San Diego, on March 18, 2002, and opinion and order awarding attorneys fees and costs as required by C.C.P. §425.16 entered June 14, 2002, merged in the judgment entered by the Superior Court on July 19, 2002. This Court has jurisdiction over Bernardo's Petition pursuant to 28 U.S.C. §1257(a).

The Attorney General for the State of California has been served with Bernardo's Petition as this case calls into question the constitutionality of C.C.P. §425.16 such that 28 U.S.C. §2403(b) may apply.

STATEMENT OF THE CASE

On August 15, 2001, Bernardo filed suit against PPFA on behalf of the people of the State of California. Clerk's Transcript in DO40866 ("C.T.") pp. 1-20. Bernardo's Complaint identified in exhaustive detail numerous statements that PPFA made about the safety of abortion, the safety of abortion vis a vis childbirth, and the scientific and medical literature linking induced abortion and increased risk of breast cancer; and she further alleged that those statements were false and misleading. C.T. pp. 5-17. Bernardo also alleged PPFA made the statements on their websites-and similar

statements elsewhere–to the public in connection with PPFA' provision of abortion services to consumers in the State of California. C.T. pp. 18-19.

Bernardo advanced claims against PPFA under B.P.C. §§17200 & 17500. In Count I of the Complaint Bernardo alleged that PPFA' false and misleading statements were made in connection with PPFA's offer of abortion services and violated B.P.C. §17200; In Count II of the Complaint Bernardo alleged that PPFA statements constituted false advertising in violation of B.P.C. §17500. C.T. pp. 18-19. Bernardo sought no relief for herself but only injunctive relief that would: (1) restrain PPFA from making false and misleading statements to consumers; (2) require PPFA to provide consumers with a short statement providing truthful and accurate information about the scientific and medical literature addressing the link between induced abortion and breast cancer; and (3) require PPFA to provide this truthful and accurate information to women who had received an abortion from the PPFA. C.T. pp. 19-20.

PPFA's Motion To Strike Bernardo's Complaint.

On November 9, 2001 PPFA filed a Motion To Strike Bernardo's Complaint Pursuant to C.C.P. §425.16 in lieu of an Answer on the merits. C.T. pp. 46-63; 69-139. In pertinent part that C.C.P. §425.16 provides:

> A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

C.C.P. §425.16(b)(1); App. 105a-108a. PPFA argued that Bernardo's Complaint should be struck because Bernardo's

claims infringed PPFA's First Amendment right to free speech and Bernardo could not show a reasonable probability of success on the merits as required by C.C.P. §425.16(b)(1). C.T. 48-64.

Bernardo's Showing Concerning Probability Of Success.

Well aware that PPFA's commercial speech concerning the relative safety and risk of its abortion services, and the link between induced abortion and breast cancer, fell within the terms of C.C.P. §425.16, Bernardo filed her Complaint prepared to demonstrate that she could substantiate her claims as required by the statute.

Bernardo's duty to demonstrate a "probability that the plaintiff will prevail on the claim," see C.C.P. §425.16, was shaped by two related bodies of law. First, the law governing claims brought pursuant to B.P.C. §§17200&17500, which prohibit false and misleading statements made in connection with the provision of goods and services to the public. *See* App. 109a-111a. Second, and relatedly, the law describing "commercial speech" properly subject to regulation pursuant to the state's unquestioned power to legislate for the public health, safety, and welfare.

Section 172000 of the California Business & Professions Code broadly defines unfair competition to be "any unlawful, unfair or fraudulent business act or practice...." B.P.C. §17200. A violation of B.P.C. §17500 is a violation of §17200. *Id.* Section 17500 also prohibits false statements in advertising made in connection with an offer of services. B.P.C. § 17500. Courts have read both sections broadly to effectuate their goal: protecting the public from false and misleading statements made for the sake of profit. *See e.g. Rubin v. Green*, 4 Cal. 4th 1187, 1200 (1993)(law embraces "'anything that can properly be called a business practice and that at the same time is forbidden by law.'"). *People v.*

Toomey, 157 Cal. App. 3d 1, 16-17 (1984)(statements are "false or misleading" under §17500 "'if members of the public are likely to be deceived.... The statute affords protection against the probability or likelihood as well as the actuality of deception or confusion.'"). It is fundamental that B.P.C. §17200 imposes strict liability. *Podolsky v. First Health Care*, 50 Cal. App. 4th 632, 647 (1996). And "[f]alse and misleading representations within the meaning of §17500 necessarily constitute unfair business practices within the meaning of [BPC §17200]". *People v. Dollar Rent-A-Car*, 211 Cal. App. 3d 119, 129 (1989); *See Chern v. Bank of America*, 15 Cal. 3d 866, 876 (1976)(BPC §17500 bars false and misleading statements, understood as those likely to mislead the public).

Both statutes bar statements that are false or misleading due to the omission of material facts. *See e.g. Day*, 63 Cal. App. 4th at 332-33 ("A perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable...."); *People v. Toomey*, 157 Cal. App. 3d 1, 17 (1984)(failure to disclose conditions and limitations on coupons misrepresented nature and value of product). Both sections are routinely used to prevent the deception of consumers regarding the health-risk or efficacy of goods and services. *See e.g. Kahn v. Medical Board of California*, 12 Cal. App. 4th 1834, 1845-47 ((1993)(Physician liable under BPC §17500 for negligently representing that two employees were licensed health care professionals); *Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy*, 4 Cal.App.4th 963 (1992)(40 day trial over safety of unpasteurized milk); *Consumer Justice Center v. Trimedica International*, 107 Cal. App. 4th 595 (2003)(efficacy of herbal supplements); *Consumer Justice Center v. Natural Balance*, (2002) 98 Cal. App. 4th 1056, 121 Cal.Rptr.2d 799 (same)

Committee on Children's Television v. General Foods Corp, 35 C3d 197 (1985)(nutritional claims made about breakfast cereals); *Stop Youth Addiction Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 71 Cal.Rptr 2d 731 (1998)(advertising designed to encourage minor consumption of tobacco).

Both statutes impose liability where persons engage in concerted action that results in the dissemination of false and misleading information to the public. *See e.g. Quelimane Co. v. Stewart Title Guaranty Co.*, 19 Cal. 4th 26 (1998)(concerted action/conspiracy to violate UPC); *People v. Bestline Products, Inc.*, 61 Cal. App. 3d 879 (1976)(joint and several liability for scheme to communicate misrepresentations); *People v. Tierney*, 253 Cal. App. . 2d 1 (1967)(conspiracy to violate provisions barring false and misleading advertising). The statutory duty cannot be avoided by reliance on statements disseminated by others. *See e.g. People v. Forest E. Olson, Inc.*, 137 Cal. App. 3d 137, 139 (1982). And there is no non-profit exception to the bar on false and misleading speech. *See e.g. People v. Orange County Charitable Services*, 73 Cal. App. 4th 1054, 1072 (Cal. App. 1999) (sustaining §§ 17500 false advertising liability of charitable fundraisers).

Bernardo also showed that the First Amendment does not prohibit the regulation of false and misleading statements made in connection with an offer of services. Relying on decisions from this Supreme Court of the United States the California Supreme Court has recognized that "government may entirely prohibit commercial speech that is false or misleading." *Kasky v. Nike, Inc.*, 27 Cal.4th 939, 946 (2002) (as modified May 22, 2002). This simply reflects a truism: "false or misleading commercial speech is not protected."). *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623-24 (1995) ("commercial speech receives limited amount of protection...and may freely be regulated if it is misleading);

Friedman v. Rogers, 440 U.S. 1, 9, (1979)(citations omitted)("The First Amendment...does not prohibit the State from insuring that the stream of commercial information flows cleanly as well as freely.").

Relying on an extensive body of precedent from this United States Supreme Court as well as its own decisions, the California Supreme Court in *Nike*, recognized that the test for commercial speech consists in a realistic inquiry that focuses on the following factors: (1) the identify of the speaker, as someone engaged in commerce (generally the distribution or sale of goods and services); (2) the intended audience (generally actual or potential buyers of goods or services or someone likely to influence actual or potential customers); and (3) the content of the speech (generally factual representations about the goods or services). *Kasky v. Nike, Inc.*, 27 Cal.4th at 960-63. Of course, *Nike*, rendered while Bernardo's case was pending, simply reflects longstanding decisions from this Supreme Court. *See e.g. Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67-68 (1983)(informational pamphlets concerning contraceptives were commercial speech given their advertising format; reference to a specific product, and the underlying economic motive of the speaker.).

It is fundamental the regulation of commercial speech cannot be avoided by the mixture of commercial and noncommercial speech; for such a rule would eviscerate the regulation of commercial speech. *See e.g. Board of Trustees of the State of New York v. Fox*, 492 U.S. 469, 474 (1989) (finding that "[n]o law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares."); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. at 67-68,("We have made clear that advertising which 'links a product to a current public debate' is not thereby

entitled to the constitutional protection afforded noncommercial speech.").

And the need to protect consumers from false and misleading commercial speech authorizes the myriad of statutes, regulations, or judicial orders that restrain false speech or require accurate disclosures or curative warnings fully consistent with the First Amendment. *See e.g. Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985)(rule requiring disclosure to ensure information is not misleading is consistent with First Amendment); *see also Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 571 (1980)(endorsing a system of prior restraints as an acceptable method of regulating commercial speech.); *see also In Consumers Union of U.S., Inc., v. Alta-Dena Certified Dairy*, 4 Cal. App. 4th 963 (1992)(injunction pursuant to B.P.C. §§17200 & 17500 barring false and misleading statements and requiring seller to provide warning as remedy for past misrepresentation is proper). It is well established that abortion providers may be required to provide truthful and accurate information in connection with their provision of abortion services. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S.Ct. 2791 (1992)(informed consent disclosure requirements are constitutional). Of necessity, Bernardo relied upon these longstanding legal principles when she determined whether she could advance her claims against PPFA and assessed–to the best of her ability–whether she had a probability of success on the merits.

Bernardo's Showing That PPFA's Speech Is Commercial Speech Actionable Pursuant To B.P.C. §§17200&17500.

Benardo began her effort to demonstrate a "probability of success" by demonstrating that PPFA makes its services available to consumers *via* websites, and that immediately

upon arriving at the PPFA website access is provided to "health info" and information about PPFA clinics, including PPSDRC. Ex. 10, pp. 1, 3.[1] For those interested in abortion services, PPFA asks "where can I get a surgical abortion?" and then answers "Contact Planned Parenthood at 1-800 230 PLAN...." Ex. 10, p. 10. Access to the location of health centers and to sexual health information is provided on virtually every page, including the pages containing PPFA's statements about the safety of abortion, the safety of abortion vis a vis childbirth, and the scientific and medical evidence addressing the link between induced abortion and breast cancer. Ex. 10, pp. 7, 9-10, 16-18, 25-32, 33-38. PPFA clinic locations are listed by zip code. Ex. 10, p. 6, 11, 13, 23.

PPFA's site provides the number for each of its clinics, gives pricing information and states that "[h]ospitals generally cost more." Ex. 10, p. 10. PPSDRC's site gives payment information, clinic locations, and allows the visitor to make an appointment. Ex. 10, p. 21-23, 37. Virtually every webpage gives a toll free number, "1-800-230-PLAN", which the visitor can use "to schedule an appointment at the nearest Planned Parenthood Center." See e.g. Ex. 10, p 89, 10, 11, 13, 33, 36; The site for PPSDRC includes its local number and the same 1-800 number given on PPFA's site. Id at p. 14-15, 22-23.

Bernardo's evidence demonstrated that PPFA "supported a nationwide, toll-free appointment line...which automatically connects callers to their nearest Planned Parenthood center...[and] allows affiliates to pool their advertising

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[1] Exhibits 10-14 which Bernardo filed in the Superior Court have been included in the Appendix at pages 112a-523a. They are cited here by the Bates-stamp numbers used in the state court record, which are given in the Appendix.

resources....Calls to the line, which was implemented in 1993, averaged 4,500...per month." Ex. 11, p. 16. By 1998 "an average of more than 14,000 callers used the line every month...." Ex. 11, p. 26, 30, 32. PPFA also engages in marketing research "used to develop a unified advertising campaign that can be adapted for use by all affiliates." Ex. 11, p. 32. Clinics are rewarded for "[m]arketing effort that result in an increased number of clients," "significant expansion of teen patient load," and "successful media/marketing campaign targeted to youth." Ex. 11, pp. 42-44.

PPFA's role in the delivery of services via "Planned Parenthood" clinics follows from its function as national office for the "federation" of affiliated clinics that "functions on behalf of the [a]ffiliates...for policy and program initiatives...administers the standards mandated by the [m]embership" and "supports the work of the [a]ffiliates in providing leadership, support, and services to facilitate the delivery of reproductive health care...." Ex. 11, pp. 47, 91. "The standards of affiliation are established by the affiliate membership....for the protection of...affiliates, and the integrity of the Planned Parenthood service mark." Ex. 11, p. 5; Clerk's Transcript DO40186 ("C.T.") p. 380 (emphasis added). Affiliates must comply with PPFA's medical protocols to remain affiliated. Ex. 11, pp. 117-18. Compliance is monitored via on-site visits. Ex. 11, pp. 9-10. The right to use PPFA's "trademark" ends upon disaffiliation. Ex. 11, pp. 115, 123, 126 (emphasis added). "PPFA establishes and monitors medical guidelines and protocols to maintain affiliates' outstanding reputation for high-quality medical care." Ex. 11, pp. 13-14; Id pp. 16, 22, 24 26.

PPFA staffs, supplies, and insures its affiliated health centers. PPFA recruits employees for affiliates. Ex. 11, p. 14. PPFA provides training to employees of affiliated clinics.

Ex. 11, pp. 22, 24, 14, 28, 32, 13. "To provide affiliates with low-cost medical supplies and contraceptives...[it] negotiated group-purchasing agreements." Ex. 11, p. 26. PPFA affiliates receive insurance coverage via a related for-profit corporation operating out of Bermuda which shares an overlapping board/common membership with PPFA. Ex. 11, pp. 111, 118, 167, 88, 34, 36, 38.

Bernardo's showing also demonstrated that this thoroughgoing marketing system produces results for PPFA and its clinics, including PPSDRC. "Each year, Planned Parenthood health centers nationwide provide high quality, affordable reproductive health care and sexual health information to more than five million women, men and teens." Ex. 10, p. 6. In the 1990's combined balance revenues were reported around $400-$500 million with clinic revenue accounting for around 35% of total revenue. Ex. 11, pp. 39-53. For the year ending June 30, 2000, combined revenues were $627 million with clinic income accounting for 36%. Ex. 11, pp. 55-56. PPSDRC is part of this nationwide system and produces revenue. Ex. 11, p. 16, 33-39. PPFA receives revenue from its affiliated member clinics in connection with the use of its mark, as well as its marketing, administration, monitoring, recruiting, training, and insuring functions. Ex. 11, pp. 34, 92, 63, 65, 68, 79-80, 109 127-28. In short, PPFA works hand–in–glove with its clinics, including PPSDRC, for the purpose of delivering abortion services for payment.

Bernardo's Showing That PPFA' Statements Are False And Misleading.

Bernardo's showing also demonstrated that PPFA makes false and misleading statements of fact about abortion services. In addition to the Declaration of Dr. Joel Brind, PhD, filed with her Complaint, and declarations from the

plaintiffs, Bernardo provided declarations from five medical doctors, one from each medical speciality required to address the increased risk of breast cancer caused by induced abortion over the life of a woman (ob-gyn, pediatrics, family practice, oncology, and breast surgery). More specifically, Bernardo provided expert testimony from the following doctors: (1) Dr. Elizabeth Shadigian, a board certified ob-gyn engaged in clinical practice and teaching at the University of Michigan, who has conducted her own (as yet unpublished) meta-analysis of the literature addressing the link between induced abortion and increased risk of breast cancer; (2) Dr. Jane Anderson, a board certified pediatrician teaching at the University of California, San Francisco; (3) Dr. Chris Kahlenborn, a physician of internal medicine engaged in clinical practice and epidemiological research who has published on the ABC-link; (4) Dr. Jose Bufill, a medical doctor practicing medical oncology, a Clinical Assistant Professor of Medicine at Indiana University, and Director of Medical Education at Saint Joseph Medical Center; and (5) Dr. Angela LanFranchi, a surgeon specializing in breast surgery and a clinical professor at Robert Woods Johnson Medical School. C.T., pp. 249-256, Ex. 7, ¶¶ 2-14, 16-22; C.T. pp. 311-12, 314-325, Ex. 9, ¶¶ 2-6, 8-38; C.T. 207-213, 219-226, Ex. 5, ¶¶2-15, 30-50; C.T. pp. 288-99, Ex. 8, ¶¶52-73; C.T. pp. 235-42, 246, Ex. 6,¶¶2-19, ¶34.

Bernardo's showing also demonstrated that PPFA makes false and misleading statements of fact about the risk and safety of abortion services and the scientific studies addressing the link between induced abortion and breast cancer. For example, PPFA states: "In the first 20 weeks, abortion is much safer than giving birth," explaining that "Death occurs in 1 of 100,000 abortions. Childbirth carries seven times more risk." Ex. 10, p. 15. PPFA also states that: "Today, abortion is one of the most commonly performed clinical

procedures, and the current death rate from abortion at all stages of gestation is 0.6 per 100,000 procedures. This is eleven times safer than carrying a pregnancy to term and nearly twice as safe as a penicillin injection." Ex. 10, p. 17. PPSDRC states that: "Today, abortion is about twice as safe as having your tonsils out and is safer than childbirth. In fact, abortion is 11 times safer than giving birth up to the 18th week of pregnancy." Ex. 10, p. 21. Bernardo's showing demonstrated that these statements are false because induced abortion does cause breast cancer and, as a result, abortion is not safer than childbirth. See e.g. C.T. 249-53, Ex. 7, ¶¶ 2-14, 16-22; C.T. pp. 311-312, 314-18, Ex. 9, ¶¶ 2-6, 8-17; C.T. p. 220, Ex. 5, ¶¶ 31-33; C.T. pp. 288-93, Ex. 8, ¶¶52-60, 71-74; C.T. pp. 236-37, 246, Ex. 6,¶¶ 3, 34.

Bernardo's showing also demonstrated that PPFA's and PPSDRC's statements relating to the "protective effect," are misleading–indeed unintelligible and self-contradictory. PPFA answers the question, "Does abortion cause breast cancer?" by stating, "No. But abortion does not offer the same protection against breast cancer as a full term pregnancy." Ex. 10, p. 35 (emphasis added). PPSDRC answers the same question by stating, "No, but abortion does not offer the protection against breast cancer that having several pregnancies does." Ex. 10, p. 37-38 (emphasis added). Bernardo demonstrated that these statements are false and misleading because, *inter alia*, an induced abortion offers no protection against breast cancer (never mind the "same" protection) and it is one first full term pregnancy (not any "full pregnancy" and not "several pregnancies") that provides the protection against breast cancer which is so valuable to a woman. C.T. pp. 16-17, Ex. 12, ¶¶17r & 17s; C.T. pp. 324-25, Ex. 9, ¶¶ 36-37.

Bernardo's showing also demonstrated that PPFA's statements concerning the safety of abortion and the safety of

abortion *vis a vis* childbirth are false and misleading because they ignore the "independent effect" that an induced abortion has in increasing breast cancer risk (i.e. in addition to the increased risk caused by abrogation of the protective effect), an effect established by the overwhelming preponderance of the scientific/medical evidence C.T. pp. 250-52, Ex. 7, ¶¶ 5-10; C.T. pp. 208-10, Ex. 5, ¶¶ 5-10; C.T. pp. 236-38, Ex. 6, ¶¶3-9; C.T. pp. 289-92, Ex. 8, ¶¶ 53-58; C.T. pp. 314-16, Ex. 9, ¶¶ 9-11. Indeed, *The Breast*, an authoritative medical text that examines evidence concerning risk of breast cancer, also recognizes that induced abortion increases breast cancer risk. C.T. p. 257-58, Ex. 7, ¶27; C.T. p. 213, Ex. 5, ¶17; C.T. pp. 294-95, Ex. 8, ¶63.

Finally, Bernardo's showing demonstrates that PPFA makes false and misleading statements of fact about the findings, content, and weight of the scientific evidence addressing the link between induced abortion and breast cancer. For example, PPFA actually misrepresents the conclusions of the well known Dalings study (stating that Daling described her findings as inconclusive when, in fact, the Dalings' study found significant overall increased risk) and, further, representing that Daling's findings were susceptible to reporting bias, which was tested for and ruled out. C.T. pp. 187-89, Ex. 4, ¶¶ 27-29; Ex. 10, p. 27. PPFA misrepresents the findings of Brind's meta-analysis (as finding a slight increase in risk when, in fact, the study found substantial [30%] increased risk); C.T. pp. 187-89, Ex. 4, ¶¶ 27-29; Ex. 10, p. 27; see also C.T. pp. 252-53, Ex. 7, ¶¶ 12-13 ("meta-analysis" more powerful than any individual study). Indeed, PPFA's repeatedly makes false and misleading statements of fact about the findings, content, flaws, and weight of the scientific evidence addressing the link between induced abortion and increased risk of breast cancer in numerous ways, creating a totally false and

misleading impression about the scientific evidence relating to the link between induced abortion and breast cancer. See C.T. pp. 181-190, Ex. 4, pp. 7-16, ¶¶12-38; Ex. 10, pp. 25-29; C.T. pp. 251, , 253, 255-56, Ex. 7, ¶¶ 9, 14, 20-22; C.T. pp. 316-325, Ex. 9, ¶¶ 12-37; C.T. pp. 207-13, 219-36; Ex. 5, ¶¶2-15, 30-50; C.T. pp. 288-99, Ex. 8, ¶¶52-74; C.T. pp. 235-42, 246, Ex. 6,¶¶2-19, ¶34. Critically, Bernardo's claims address false and misleading statements of fact about the scientific evidence, not statements of opinion. Indeed, PPFA's false and misleading statements are made in "fact sheets". See e.g. Ex 10, pp. 7, 16, 25. And PPFA has said that that the disclosure of the information sought by Bernardo on this risk factor is "not part of the counseling at Planned Parenthood health centers...." Response (in DO40186) at p. 5; see also Ex. 10 at pp. 35, 37-38, 29-30. Bernardo argued that this evidence was plainly sufficient to satisfy her burden under C.C.P. §425.16 such that the PPFA' motion should be denied; and she further argued that striking her claims pursuant to C.C.P. §425.16 would violate her constitutional right to petition and access the courts, free speech, due process, and equal protection. C.T. pp. 146-65.

Disposition Of Bernardo's Claims By California Courts.

On March 18, 2001, the Superior Court for San Diego County, the Hon. Ronald S. Prager presiding, granted PPFA motion to strike. C.T. pp. 467. The Superior Court found that Bernardo had failed to make the prima facie showing of probability of success needed to withstand PPFA's motion to strike because Bernardo had failed to make a showing that PPFA's statements were commercial speech, and also, that PPFA's statements consisted in false and misleading statements (and therefore unfair trade practices or false advertising) prohibited by B.P.C. §§17200 & 17500. The Superior Court ignored Bernardo's objections to the statute based on her right to petition, free speech, due process and

equal protection. Bernardo appealed this decision, and her appeal was docketed as number DO40186. C.T. (in DO40186) pp. 468-69.

By motion filed April 26, 2002, PPFA requested attorneys fees in the amount of $77,835.25 pursuant to C.C.P. § 425.16(c). C.T. pp. 468-512. Bernardo objected to the award arguing, among other things, that an award of fees under the statute would violate her constitutional rights to petition and access the courts, free speech, due process, and equal protection. C.T. pp. 520-33. By order dated June 14, 2002, The Superior Court of California, County of San Diego, the Hon. Ronald S. Prager, presiding, granted PPFA motion for attorney fees in the amount of $77, 835.24, finding the award of fees mandatory, the amount reasonable, and also, that the award of fees and costs did not violate Bernardo's constitutional rights. C.T. 548-51. On July 19, 2002, Judge Prager entered a final judgment dismissing Plaintiffs' claims and awarding attorneys fees to the PPFA in the amount of $77,835.25. C.T. pp. 552-55. Bernardo appealed the award of fees and her appeal was docketed as DO40866. C.T. 556-58.

In connection with her appeals in DO40186 & DO40866 Bernardo argued, among other things, that the order striking her claims and judgment making her liable for attorneys fees and costs pursuant to C.C.P. §425.16 violated her right to petition and access the courts, as well as her rights to Due Process and Equal Protection. Because Bernardo's claims implicated the definition of commercial speech, the California Court of Appeals stayed Bernardo's appeals pending this United State Supreme Court's decision on the merits in *Kasky v. Nike, Inc.*, 27 Cal. 4th 939 (2002), *cert. granted*, 537 U.S. 1099 (2003), *and cert. dismissed*, 539 U.S. 654 (2003). When this Court dismissed the *Nike* case the stay was lifted; and Bernardo's appeals were argued on January 12, 2004.

The Court Of Appeal, Fourth Appellate District, Division One, State of California, consolidated Bernardo's appeals for the purpose of rendering a decision and affirmed in a published opinion filed January 28, 2004. *Bernardo v. Planned Parenthood Federation of America*. App. 2a-72a The Court found that Bernardo had failed to show a probability of success on the merits of her claims that PPFA was engaged in commercial speech and made false and misleading statements in violation of B.P.C. §§17200 & 17500. App. 2a-54a. The Court of Appeal also rejected Bernardo's argument that the striking of her claims and imposition of liability for attorneys fees and costs pursuant to C.C.P. §425.16 violated her right to petition, right to Due Process, and right to Equal Protection. App. 55a-66a.

Bernardo timely filed a Petition For Review with the California Supreme Court on March 9, 2004. In her Petition she argued, among other things, that the striking of her Complaint and imposition of liability for PPFA's fees and costs pursuant to C.C.P. §425.16 violated her rights to Petition, Due Process, and Equal Protection. The California Supreme Court denied Bernardo's Petition For Review on April 14, 2004. App. at 1a.

ARGUMENT FOR REVIEW

Bernardo now petitions this Supreme Court of the United States for a writ of certiorari. This Court should grant Bernardo's Petition for two related reasons. First, the use of C.C.P. §425.16 to strike Bernardo's claims and award of costs and fees violates Bernardo's right to petition, right to Due Process, and her right to Equal Protection as defined by this United States Supreme Court such that the C.C.P. §425.16 is, therefore, inconsistent with the requirements of federal law. Second, and relatedly, the decisions by the courts of the State of California rejecting Bernardo's claim

that C.C.P. §425.16 violates these rights guaranteed to her by the United States Constitution decides important questions of federal law that must be decided by this United States Supreme Court. See S.C.R. 10(b)&(c).

Although the legal and factual bases for Bernardo's state-law claims are complex, the issues presented by her Petition are relatively simple and straightforward. Bernardo brought a claim to prevent the dissemination of false and misleading statements to the public in connection with an offer of abortion services pursuant to state statutes that authorize citizens to advance such claims. She sought nothing for herself and asked only for relief designed to ensure that the public receives truthful and accurate information about the number one cancer cause of death for middle-aged women in America. Her claims are legally and factually complex, well grounded in the governing law, and well supported by the evidence she collected before filing suit–evidence submitted to the court in response to PPFA's motion to strike.

At the time of filing it was impossible for Bernardo to predict with any certainty the resolution of the numerous and complex legal and factual issues presented by her claim–and it remains so at this time. At the time of filing it was impossible to predict with any certainty the view that any judge would take as to her probability of success on the merits–and it remains so at this time. In a very real sense the only thing that was certain about Bernardo's claims at the time she filed her Complaint was that those claims were not subjectively or objectively frivolous. It simply cannot be said that Bernardo's claims lacked arguable support in fact and law; and the uncontested evidence of record demonstrates that she has no ill-intent in filing her action as well as no personal stake in its outcome.

Thus, the question presented by Bernardo's Petition is whether Bernardo can be ordered to pay $77,835.25 (as well as additional fees and costs incurred in connection with her appeals), for filing her suit consistent with her constitutional right to petition as well as her right to Due Process and Equal Protection. The answer to that question is: No. Bernardo cannot be ordered to pay $77,835.25 (and made liable for additional costs and fees incurred in connection with an appeal), for filing a suit that is not subjectively or objectively groundless consistent with her constitutional right to petition. She cannot be fined for accessing the courts based on a "probability of success" standard that provides no meaningful notice when applied to litigation, and she cannot be penalized for accessing the courts absent a heightened showing of fault proven to a heightened evidentiary standard, consistent with her right to Due Process. Moreover, Bernardo cannot be forced to pay a fine that is assessed pursuant to a statute that discriminates between citizens based on their exercise of fundamental rights and opens the courts on different terms to different litigants consistent with her right to Equal Protection. These constitutional protections allow Bernardo to file a lawsuit without fear of a draconian penalty suffered by those who are unable to predict the inherently unpredictable. For these reasons, C.C.P. §425.16, the California statute that authorized the striking of her claims and the award of attorneys fees and costs, is unconstitutional.

I. C.C.P. §425.16 Violates Bernardo's Right To Petition.

There is no question that C.C.P. §424.16 violates Bernardo's First Amendment right to petition because it does not require a showing of subjective and objective frivolousness prior to the imposition of liability for attorneys fees and costs when claims are dismissed on the theory that they are not likely to succeed. As the California Supreme Court itself has recognized "[t]he constitutional right to

petition encompasses the basic act of filing litigation." *See e.g. Navellier v. Sletten*, 29 Cal.4th 82, 90, 52 P.3d 703, 124 Cal.Rptr.2d 530 (2002). This is especially true where, as here, the action is filed on behalf of the public; for, as this Court has recognized, litigation brought in the public interest deserves the full protection of the First Amendment because it is itself a form of expressive activity. *See e.g. NAACP v. Button*, 371 U.S. 415 (1963)(First Amendment protects rights of persons to engage in litigation to further protection of civil rights); *In Re: Edna Smith Primus*, 436 U.S. 412, 98 S.Ct. 1893 (1978)(First Amendment bars regulations impeding right of attorneys to find plaintiffs for public interest litigation).

This Court has repeatedly held that the right to petition voids laws that chill this right by imposing liability for fees and cost without requiring a showing of frivolousness as a predicate for liability. *See e.g. BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002)(employer's unsuccessful retaliatory lawsuit against unions could not serve as a basis for imposition of liability for unfair labor practices absent a showing that the lawsuit was objectively baseless); *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.* 508 U.S. 49 (1993)(barring antitrust liability for litigation because suit was both objectively and subjectively baseless); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983) (lawsuit brought for improper motive cannot be enjoined provided it is not a sham). Indeed, as the California Supreme Court has recognized "[p]laintiffs and their attorneys are not required, on penalty of tort liability, to attempt to predict how a trier of fact will weigh the competing evidence, or to abandon their claim if they think it likely the evidence will ultimately weigh against them. They have the right to bring a claim they think unlikely to succeed so long as it is arguably meritorious." *Wilson v. Parker, Covert & Chidester*, 28 Cal.4th 811 (2002)(citations omitted); *see also Oren Royal*

Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc, 42 Cal. 3d 1157 (1986)(refusing to expand claim for abuse of process because it would impose penalties for efforts to access courts); *Pacific Gas and Electric Co. v. Bear Stearns & Co.*, 50 Cal.3d 1118 (1990)(Constitutional right to petition meant that filing of lawsuit cannot provide basis for interference with contract claim unless lawsuit was advanced without probable cause within meaning of malicious prosecution action).

Cases voiding penalties heaped on unsuccessful litigants for non-frivolous claims borrow from, and reflect, a more general First Amendment principle: the law cannot impose liability for First Amendment activity except where it requires a showing sufficient to ensure that First Amendment rights are not improperly burdened. *See e.g. New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (no liability for defamation regarding public figure absent showing of reckless disregard for the truth by clear and convincing evidence.); *McDonald v. Smith*, 472 U.S. 479, 105 S.Ct. 2787, 86 L.Ed.2d 384 (1985)(no tort liability for petition to President absent reckless disregard for the truth); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (no personal liability for torts committed by fellow protestors absent specific intent via authorization, direction, ratification of specific tortious activity, incitement of imminent lawless action, or specific instructions to carry out violent acts or threats); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988)(no liability for emotional distress based on protected speech absent heightened showing); *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (invalidating statute that allowed punishment for publication of lawfully obtained truthful information where state law imposed a negligence *per se* standard for liability). Taken together these cases show that the First Amendment right to petition likewise precludes liability for

fees absent a showing that the suit is subjectively and objectively groundless.

Significantly, the liability imposed by C.C.P. §425.16 cannot be insulated from constitutional requirements by labeling the liability an award of fees to a prevailing party. There is no material difference between an award of fees under C.C.P. §425.16(c) and the award of fees as damages for malicious prosecution, abuse of process, or damages awarded for any tort; indeed, the fee award is designed to compensate defendants for the cost of defending the suit–an item of damages in any case involving harm caused by judicial process. *Conroy v. Spitzer*, (1999) 70 Cal. App. 4th 1446 (statutory award of costs and fess is designed compensate defendant for expense of responding to baseless lawsuit). Thus the fee liability created by C.C.P. §425.16, a liability for the very act of petitioning (and pre–filing investigation) not the conduct of litigation, is no different–and no less illicit–than any other form of liability imposed for activity protected by the First Amendment.

Bernardo's case demonstrates the improper burden on petitioning activity created by C.C.P. §425.16. There is no question that Bernardo's claim is not frivolous–either objectively or subjectively. Under these circumstances, the dismissal of Bernardo's claims and imposition of liability for fees and costs pursuant to C.C.P. §425.16 violates her First Amendment right to petition because it is nothing less than a strict liability penalty for petitioning. The cases holding that federal law cannot impose liability for cost and fees upon unsuccessful litigants absent a showing of frivolousness do so precisely because such awards function as a penalty that would eviscerate the right to petition. California's courts have chosen to ignore the true thrust of these decisions and the very substance of the right to petition. *See, e.g., Equilon Enterprises, LLC v. Consumer Cause, Inc.*, 29 Cal.4th 53,

63, 52 P.3d 685, 691,124 Cal.Rptr.2d 507, 515 (2002); *Navellier v. Sletten*, 29 Cal.4th 82, 88-89, 52 P.3d 703, 124 Cal.Rptr.2d 530 (2002). Put simply, the disposition of Bernardo's claims by the courts of the State of California demonstrates that C.C.P. §425.16, as written and applied by California Courts, does not require a showing of frivolousness prior to an award of attorneys fees under the statute. For this reason alone C.C.P. §425.16 is unconstitutional.

II. C.C.P. §425.16 Violates Bernardo's Right To Due Process Of Law.

C.C.P. §425.16 also violates Bernardo's Due Process rights for a number of related reasons. First, the "probability of success on the merits" standard imposed by the statute is unconstitutionally vague. The reason is simple: no one can predict with any certainty how a given judge will view the probability of success of any litigation at the outset of any legal proceeding. This vagueness is itself a fatal defect because it makes C.C.P. §425.16 operate as a fine imposed on the effort to access the courts based on a standard that fails to provide reasonable notice of the conduct that will produce liability. But the inherent vagueness in this standard is compounded by failure to require the heightened showing needed to impose damages in connection with activity that implicates fundamental rights–including First Amendment rights, (e.g., a showing of fault akin to reckless disregard demonstrated to a heightened evidentiary standard, e.g., clear and convincing evidence). Each of these defects standing alone make C.C.P. §425.16 violate Due Process.

The statutes most egregious violation of Due Process is the absence of a meaningful standard for liability. It is fundamental that Due Process requires that a statute provide a person of ordinary intelligence with fair notice of the conduct that will produce a sanction. *See e.g., City of*

Chicago v. Morales, 527 U.S. 41 (1999)(anti-loitering ordinance void where it failed to provide fair notice of the conduct prohibited); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (vagrancy law void where it failed to give person of ordinary intelligence fair notice of conduct that is forbidden); *see also City of Glendale v. George*, 208 Cal. App.3d 1394, 256 Cal. Rptr. 742 (1989)(Due Process requires law to give person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.). Likewise, there is no question that Due Process prohibits financial restrictions on the right to access courts. *See e.g. M.L.B. v. S.L.J.*, 519 U.S. 102 (1996)(state statute conditioning right to appeal on ability to pay costs violated Due Process and Equal Protection); *Zablocki v. Redhail*, 434 U.S. 374 (1978)(statute conditioning access to court for purpose of marriage on payment of child support violated Due Process); *Bodie v. Connecticut*, 401 U.S. 371 (1971)(law limiting court access to those who could pay fees deprived violated Due Process); *see also Degen v. United States*, 517 U.S. 820 (1996)(barring use of "disentitlement" doctrine to strip litigant of right to access courts to defend title to property based on refusal to submit to criminal prosecution); *California Teachers Association v. State of California*, 20 Cal. 4th 327 (1999)(law imposing costs upon employees who unsuccessfully challenge their termination or suspension violated Due Process).

C.C.P. §425.16 violates both these fundamental principles because it fails to provide fair notice of liability and, by the same token, conditions the right to access the courts on the ability to risk a draconian fine. The "reasonable probability of success on the merits" standard imposed by C.C.P. §425.16 is meaningless in practice because it gives litigants no meaningful notice concerning which petitioning activity is prohibited by the statute and will result in liability. Again,

the courts of the State of California have recognized that litigants are "not required, on penalty of tort liability, to attempt to predict how a trier of fact will weigh the competing evidence, or to abandon their claim if they think it likely the evidence will ultimately weigh against them. They have the right to bring a claim they think unlikely to succeed so long as it is arguably meritorious." *Wilson v. Parker, Covert & Chidester*, 28 Cal.4th 811 (2002)(citations omitted). Similarly, California courts have recognized that many claims fail due to the inherent uncertainty of the litigation process or the simple failure of proof quite apart from their merits. *See e.g. Wolfgram v. Wells Fargo Bank*, (1997) 53 Cal. App. 4th 43, 58 ("As a matter of common experience even many meritorious suits fail, due to the vagaries of the trial process if nothing else. Many more colorable suits fail, either due to pretrial disposition or failure to persuade the trier of fact."). Yet California's courts have steadfastly refused to recognize that this incontrovertible reality makes the "probability of success" standard an unconstitutional burden upon the right to access the courts without fear of liability. *See e.g. Equilon Enterprises, LLC v. Consumer Cause, Inc.*, 29 Cal.4th 53 (2002).

Notwithstanding the rhetoric of California's courts, C.C.P. §425.16's failure to provide reasonable notice of the conduct that will produce liability strips Bernardo of her liberty to access the courts–and deprives her of her property–in violation of Bernardo's right to Due Process of law. This case is a perfect example of the wholesale disregard for Due Process authorized by C.C.P. §425.16. Bernardo's claim has manifest legal and factual merit. She has evidence that PPFA's statements are false and misleading–and made to the public in connection with the offer of abortion services such that PPFA has violated California law. While Bernardo could–and did–collect evidence to substantiate her

claims, there is simply no way for her to predict with any reasonable certainty the view that any given judge would take of her probability of succeeding on the numerous factual and legal issues raised by her claims. Thus, the net result of the standard imposed by C.C.P. §425.16 is to condition Bernardo's ability to access the courts on her ability to predict the inherently unpredictable–all under pain of a fine in the form of attorney fees. In short, C.C.P. §425.16 is unconstitutional because it conditions her right to access the courts–and subjects her to a risk of draconian penalties–based on a standard that fails to provide reasonable notice concerning the type of conduct that will result in liability.

But C.C.P. §425.16 also violates Bernardo's right to Due Process for an additional reason: it does not include the heightened evidentiary showing and heightened burden of proof needed to impose liability in connection with activity protected by the First Amendment. It is fundamental that Due Process requires heightened protections based on the importance of the interest implicated by a given regulation, and Due Process requirements are more rigorous where the interest protected are more important. *See e.g. Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388 (1982)(clear and convincing standard required to sever parental relationship); *Troxel v. Granville*, 530 U.S. 57 (2000)(Due Process protects natural parents relationship with child and does more than require process but requires heightened protection for that fundamental interest). With respect to liability for the exercise of Bernardo's right to access the courts these cases converge with those addressing burdens on First Amendment activity insofar as they recognize the need for rigorous restraints on laws imposing liability with respect to fundamental liberties. In all these cases, courts have barred efforts to impose liability for conduct of the kind that generally receives constitutional protection absent a

heightened showing of fault (e.g. reckless disregard for the truth) which satisfies a heightened evidentiary standard (e.g. clear and convincing evidence).

Taken together these cases demonstrate that Due Process protects Bernardo's interest in accessing the courts–and retaining her property–absent a standard that limits liability to a showing of fault akin to reckless disregard proven by clear and convincing evidence. In defiance of these principles, C.C.P. §425.16 exposes citizens to liability based on a vague standard that requires no finding of fault and can be satisfied by a mere preponderance of the evidence. In effect, it is a strict liability penalty for failing to predict a court's assessment of a litigant's probability of success. C.C.P. §425.16 violates Due Process precisely because it does not contain the procedural safeguards needed to impose liability for the exercise of fundamental rights.

In short, the "probability of success" standard created by C.C.P. §425.16 conditions Bernardo's right to access the courts–and retain her property–on her ability to satisfy a standard that fails to provide reasonable notice of the conduct that will produce liability. The statute's failure to provide reasonable notice is exacerbated by its imposition of liability for protected activity without the heightened showing of fault and higher burden of proof needed to ensure that the statute does not intrude upon the exercise of her right to access the courts. For these reasons, C.C.P. §425.16 violates Bernardo's Due Process rights.

III. C.C.P. §425.16 Violates Bernardo's Right To The Equal Protection Of Law.

The dismissal of Bernardo's claims and imposition of liability for fees and costs pursuant to C.C.P. §425.16 also stripped Bernardo of her right to Equal Protection of the law. The statute discriminates between litigants–and exposes them

to different liability for fees and costs–based on the nature of their First Amendment activity and status as plaintiff or defendant.

California's C.C.P. §425.16 violates Bernardo's right to the Equal Protection of the law because it violates the fundamental rule that government is not free to discriminate between citizens based their expressive activity. The statutory language and purpose indicate that the statute and its attorneys fee provision are designed to favor a defendant's First Amendment rights over a plaintiff's First Amendment right to petition. C.C.P. §425.16(b)(1). By its terms the defendants can avail themselves of the statute if it can be shown that the plaintiff's cause of action arises from activity arguably protected by the First Amendment. C.C.P. §425.16(b)(1).

The statute then exacerbates this discrimination, which provides a special defense for defendants against claims arising from First Amendment activity (against plaintiffs engaged in First Amendment activity), by making fees mandatory where a defendant prevails while allowing plaintiffs to recover only upon a showing of frivolousness. *See* C.C.P. §425.16(c). In this regard, it must be noted that the statute is not a true fee–shifting or loser pays rule; it favors defendants that are plaintiffs on a motion to strike over plaintiffs who are defendants on a motion to strike under C.C.P. §425.16. The plaintiff is liable for mandatory fees if the defendant prevails without any showing of fault; but defendants are only liable for fees if it can be shown that the defendant's motion to strike is frivolous within the meaning of C.C.P. §128.5. *See* C.C.P. §425.16(c).

In these two related ways C.C.P. §425.16 violates the fundamental rule that government is not free to discriminate between citizens based their expressive activity. For one thing, this invidious discrimination between the exercise of

fundamental rights is plainly perverse because litigation, particularly litigation brought on behalf of the public, is itself expressive activity of the highest order. *See e.g. NAACP v. Button*, 371 U.S. 415 (1963)(First Amendment protects rights of persons to engage in litigation to further protection of civil rights); *In Re: Edna Smith Primus*, 436 U.S. 412 (1978)(First Amendment bars regulations impeding right of attorneys to find plaintiffs for public interest litigation). Thus the statute imposes an impermissible regulation based on whether a plaintiff's complaint–itself activity protected by the First Amendment–complains about activity that is arguably protected by the First Amendment.

In this way C.C.P. §425.16 demonstrates a wholly illicit discrimination between fundamental rights, in effect making the courts available to different parties, on different terms, depending upon the nature of their petitioning activity and their status as plaintiff or defendant. It is fundamental that the Equal Protection clause prohibits the government from discriminating between exercises of fundamental rights based upon the nature of the expressive conduct or the nature of the speaker. *See, e.g. City of Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286 (1972)(ordinance prohibiting all picketing but peaceful labor picketing violated equal protection by discriminating among persons based on nature of their First Amendment activity); *Carey v. Brown*, 447 U.S. 455 (1980)(invalidating ordinance that discriminated between residential and labor picketing); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)(ordinance imposing special restrictions on citizens engaged in disfavored First Amendment activity involving hate speech void); *see also Walker v. Kiousis*, 93 Cal. App. 4th 1432, 114 Cal. Rptr. 2d 69 (2001)(ordinance providing special cause of action for defamation to public officers violates Equal Protection, which requires exacting

scrutiny of discrimination between speech even where it is of a kind which might be barred entirely as a class).

These cases show that C.C.P. §425.16 violates Bernardo's right to Equal Protection precisely because the statute discriminates against litigants based on the exercise of fundamental rights. By favoring defendants who have engaged in activity arguably protected by the First Amendment over plaintiffs arguably exercising their First Amendment right to petition (with respect to the defendant's arguable abuse of First Amendment rights) C.C.P. §425.16, like the ordinances struck down in *Mosley*, and *Carey*, *supra*, is akin to a license or permitting scheme that discriminates based on the nature of expressive activity. Like the statute at issue in *R.A.V.*, *supra*, C.C.P. §425.16 turns on whether the plaintiff complains about activity that California seeks to prefer over the plaintiff's right to petition. Reduced to its essence, C.C.P. §425.16 creates an impermissible classification by providing a special defense–and allocating the risk of fees–in a way that burdens the plaintiff's fundamental right to petition. The result is to burden the plaintiff's exercise of the fundamental right to petition–and favor the defendant's fundamental right to speech or petition–by creating a risk to plaintiffs not born by their opponents in litigation. Seen in this light it is evident that C.C.P. §425.16 amounts to nothing more than an arbitrary status-based classification turning on nothing more than status as plaintiff or defendant. For these reasons, C.C.P. §425.16 violates Bernardo's right to Equal Protection.

CONCLUSION

Although the legal and factual bases for Bernardo's state-law claims are complex, the question presented by Bernardo's Petition is straightforward. Reduced to its essence the question presented by her Petition is whether Bernardo can be

ordered to pay $77,835.25 (as well as additional fees and costs incurred in connection with her appeals), for filing her suit consistent with her constitutional right to petition as well as her right to Due Process and Equal Protection. For the reasons stated herein, Bernardo submits that the answer to this question is: No. These constitutional protections allow Bernardo to file a lawsuit without fear of a draconian penalty suffered by those who are unable to predict the inherently unpredictable. For these reasons, C.C.P. §425.16, the California statute that authorized the striking of her claims and the award of attorneys fees and costs, is unconstitutional. And for these reasons Bernardo's Petition should be granted.

Respectfully submitted,

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APPENDIX A

Court of Appeal, Fourth Appellate District, Division One -
Nos. D040186/D040866
S123182

IN THE SUPREME COURT OF CALIFORNIA
En Banc

[Filed April 14, 2004]

AGNES BERNARDO et al., Plaintiffs and Appellants,	)
v.	)
PLANNED PARENTHOOD FEDERATION OF AMERICA, et al., Defendants and Respondents.	)

Petition for review DENIED.

GEORGE
Chief Justice

APPENDIX B

**COURT OF APPEAL OF CALIFORNIA,
FOURTH APPELLATE DISTRICT,
DIVISION ONE**

D040186 and D040866

[Filed January 28, 2004]

AGNES BERNARDO et al.,	)
Plaintiffs and Appellants,	)
	)
v.	)
	)
PLANNED PARENTHOOD	)
FEDERATION OF AMERICA et al.,	)
Defendants and Respondents.	)
	)

On Appeal From
Superior Court of San Diego County
No. GIC772552
Ronald S. Prager, Judge

JUDGES: NARES, Acting P. J.; McIntyre and O'Rourke, JJ., concurred.

OPINION

NARES, Acting P. J.--Agnes Bernardo, Pamela Colip and Saundra Duffy-Hawkins (collectively Bernardo) brought suit for injunctive relief against Planned Parenthood Federation of America (PPFA) and Planned Parenthood of San Diego and Riverside Counties (PPSDRC) (together Planned Parenthood) under California's Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.) and False Advertising Law (Bus. & Prof. Code, § 17500 et seq.). Bernardo alleged that PPFA's and PPSDRC's Internet Web sites (<http://www.plannedparenthood.org.html> and <http://www.planned.org.html>, respectively) contained "unlawful, unfair, confusing, and misleading statements/advertisements" that caused women to make critical health care decisions without full, complete, and accurate information about (1) the safety of abortion, (2) the safety of abortion vis- [agrave] -vis childbirth, and (3) the scientific/medical literature that Bernardo claims establishes a link between induced abortion and breast cancer (hereafter sometimes referred to as the ABC link).

Bernardo sought two types of injunctive relief: (1) an injunction restraining Planned Parenthood from publishing its statements that abortion is safe or safer than childbirth and its position that the weight of credible medical research has failed to establish a link between induced abortion and breast cancer; and (2) a mandatory injunction requiring Planned Parenthood to provide to all of its former and prospective abortion patients information supporting Bernardo's position that medical research has established the existence of the claimed ABC link.

Planned Parenthood filed a special motion to strike

Bernardo's complaint under Code of Civil Procedure[1] section 425.16, California's anti-SLAPP (strategic lawsuits against public participation) statute (hereafter referred to as section 425.16 or the anti-SLAPP statute), which was specifically enacted to provide both a summary disposition and mandatory attorney fees and costs to prevailing defendants in such actions.[2] Planned Parenthood argued that Bernardo's action was a strategic lawsuit against public participation (SLAPP) prohibited by California's anti-SLAPP statute.

The court found that Bernardo's lawsuit was a SLAPP, granted Planned Parenthood's motion, and dismissed the action. The court awarded reasonable attorney fees to Planned Parenthood in the amount of $77,835.25 under the mandatory attorney fees provision of section 425.16, subdivision (c) (hereafter section 425.16(c)).

Bernardo has filed two appeals, which have been consolidated for purposes of disposition. In case No. D040186, Bernardo appeals the court's order dismissing her action as a SLAPP under section 425.16. Bernardo contends that Planned Parenthood's Web site statements constitute commercial speech that may properly be regulated under Business and Professions Code sections 17200 and 17500 and that the court erred when it granted Planned Parenthood's section 425.16 motion to strike because it failed to properly apply the "minimal merit" screening standard provided by the anti-SLAPP statute. In the alternative, Bernardo contends that if the court correctly applied section 425.16, that statute is

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[1] All subsequent statutory references are to the Code of Civil Procedure unless otherwise specified.

[2] *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1404 [103 Cal. Rptr. 2d 174] (Dowling).

unconstitutional because (1) it impermissibly chills Bernardo's First Amendment right to petition the government for redress of grievances, which encompasses the right to access the courts by filing litigation, and (2) it violates Bernardo's due process rights because "the 'reasonable probability of success on the merits' standard [under section 425.16] is meaningless in practice."

In her second appeal, case No. D040866, Bernardo seeks reversal of the court's order awarding attorney fees to Planned Parenthood in the amount of $77,835.25 under section 425.16(c). Bernardo contends that section 425.16(c) is unconstitutional on its face and as applied, asserting the attorney fees award levied against her is a "fine," a "draconian penalty" or "strict liability penalty," and an "item of damages" that violates her constitutional rights to petition the government for redress of grievances and to access the courts by filing litigation, as well as her constitutional rights to due process and equal protection of the laws. We reject all of Bernardo's contentions. Accordingly, we affirm the orders.

FACTUAL AND PROCEDURAL BACKGROUND

A. *PPFA and PPSDRC*

PPFA is a national nonprofit charitable organization. According to its published mission statement, PPFA believes in "the fundamental right of each individual ... to manage his or her fertility." It also believes in voluntary "reproductive self-determination," and preservation of an individual's right to privacy. Based on these beliefs, PPFA's mission is to (1) "provide comprehensive reproductive and complementary health care services in settings which preserve and protect the essential privacy and rights of each individual"; (2) "advocate public policies which guarantee these rights and ensure access

to such services"; (3) "provide educational programs which enhance understanding of individual and social implications of human sexuality"; and (4) "promote research and the advancement of technology in reproductive health care and encourage understanding of their inherent bioethical, behavioral, and social implications."

PPFA has also published numerous policy statements indicating that it is the policy of PPFA to "assure that all individuals have the freedom to make reproductive decisions"; to promote "access to information and services related to sexuality, reproduction, methods of contraception, fertility control, and parenthood"; "ensure that women have the right to seek and obtain medically safe, legal abortions under dignified conditions and at reasonable cost"; provide "information on the nature, consequences, and risks of the [abortion] procedure, and counseling on the alternatives available to women, so as to assure an informed and responsible decision concerning the continuation or termination of pregnancy"; "support[] a range of activities designed to reduce adolescent pregnancy and childbearing"; and "advance understanding of the interrelationship between population growth and the quality of life."

PPFA does not itself provide health care services. However, its 127 member affiliates do provide such services annually to nearly 4 million people at 875 clinics. In 1999, those clinics served communities in the District of Columbia and every state except Hawaii, North Dakota and Mississippi. The clinics (hereafter also referred to as health centers or Planned Parenthood centers) adhere to national health standards and provide comprehensive reproductive health care services, including pregnancy tests, birth control and counseling, testing and treatment for sexually transmitted

infections, and breast examinations. Some of PPFA's affiliates, including PPSDRC, provide abortion services.

The Planned Parenthood centers also provide educational programs in a variety of settings, from universities and social service agencies to religious institutions and civic organizations. The programs focus on numerous topics, such as teenage pregnancy and puberty education, contraception and family planning, sexually transmitted infections, parent-child communication, women's health, and sexual orientation.

In the 1990's, PPFA reported total annual revenues of around $400 to $500 million. For the year ending June 30, 2000, total revenues were $627 million, with clinic revenue accounting for 35 percent.

B. *PPFA's Web site and "Fact Sheets"*

PPFA maintains an Internet Web site (PPFA's Web site) at <http://www.plannedparenthood.org.html>. PPFA assists the public in contacting its affiliates' health centers by providing on its Web site an interactive dialogue box in which visitors can type in their zip codes and be linked to the Web sites of the health centers closest to them. Once the visitor to PPFA's Web site has been linked to the Web site of a PPFA affiliate, such as PPSDRC, he or she may access a wide array of information on public affairs and health issues, as well as information about specific services the affiliate provides. PPFA's Web site also provides a toll-free telephone number that the Web site visitor may call to ask medical questions or to schedule an appointment with "the nearest Planned Parenthood center."

PPFA publishes on its Web site various "fact sheets" on reproductive health and public affairs issues, including four

containing statements that Bernardo sought to enjoin in this matter: (1) "Anti-choice Claims About Abortion and Breast Cancer" (the Anti-Choice Claims Web page); (2) "Choosing Abortion-Questions and Answers" (the Choosing Abortion Web page); (3) "Surgical Abortion-Questions & Answers" (the Surgical Abortion Web page); and (4) "Medical and Social Health Benefits Since Abortion Was Made Legal in the U.S" (the Medical and Social Health Benefits Web page).

PPFA's Anti-Choice Claims Web page stated PPFA's position that the ABC link is a "theory [that] has not been borne out by research," and the principal promoters of this theory oppose abortion. It also explained that "[t]he theory linking pregnancy termination and breast cancer is based on the hormonal disruption that occurs when a woman's pregnancy is interrupted. Pregnancy initiates a surge of sex hormones (estrogen, progesterone, and prolactin), which leads to differentiation of the cells in the breast glands in preparation for lactation. ... Adherents of this theory claim that interruption of the first trimester of a first pregnancy causes a cessation of cell differentiation that may result in a subsequent increase in the risk of cancerous growth in these tissues." The Web page also explained the role of a first full-term pregnancy in reducing the long-term risk of breast cancer (hereafter the "protective effect"):

> "While researchers do not know what causes breast cancer, reproductive factors have been associated with risk for the disease since the 17th century, when breast cancer was noted to be more prevalent among nuns. It is known that *having a full-term pregnancy early in a woman's childbearing years is protective against breast cancer* ...." (Italics added.)

The Anti-Choice Claims Web page also contained a review of some of the many studies of the alleged ABC link published during the previous 20 years, including studies that support Bernardo's position that such a link exists. For example, the page stated:

> "In 1996, Joel [L.] Brind[, Ph.D.] and his colleagues published a meta-analysis[3] of 28 published reports describing 23 studies on induced abortion and breast cancer. Based on these studies, the authors calculated that induced abortion places women at a slightly increased risk for developing breast cancer."[4]

The Web page also noted that a published 1994 study of 845 women in the State of Washington found that "among women who had been pregnant at least once, the risk of breast cancer in those who had experienced an induced abortion was 50 percent higher than among other women."[5]

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[3] The Oxford English Dictionary Online (OED Online) defines "meta-analysis" as "[a]nalysis of data from a number of independent studies of the same subject (published or unpublished), esp. in order to determine overall trends and significance." (OED Online (2003) <http://dictionary.oed.com/cgi/entry/00307098?.html> [as of Jan. 1, 2004].)

[4] In the "Works Cited" portion of the Anti-Choice Claims Web page, PPFA provided the following citation: "Brind, Joel, et al. (1996). 'Induced Abortion as an Independent Risk Factor for Breast Cancer: A Comprehensive Review and Meta-Analysis.' *Journal of Epidemiology and Community Health*, 50, 481-496."

[5] In the "Works Cited" portion of the Anti-Choice Claims Web page, PPFA cited: "Daling, Janet R., et al. (1994). 'Risk of Breast Cancer Among Young Women: Relationship to Induced Abortion.' *Journal of the National Cancer Institute*, 86(21), 1584-1592."

The Anti-Choice Claims Web page reviewed other studies that support PPFA's position on the ABC link issue, such as a study of 1.5 million women, published in 1997 in the *New England Journal of Medicine*, which PPFA asserted found no overall connection between abortion and breast cancer.[6] It also cited a 20-year study of 49,000 women in Sweden, published in 1989, which PPFA stated found no indication of an overall risk of breast cancer after an induced abortion in the first trimester of pregnancy.[7]

PPFA's Anti-Choice Claims Web page also discussed research concerning various factors that can render a study of the ABC link unreliable and asserted that "[c]ancer researchers at the National Cancer Institute, the American Cancer Society, and major universities say that the most reliable studies show no increased risk, and they consider the entire body of research inconclusive." The Web page concluded with a "Works Cited" bibliography that cited 32 published studies on the ABC link issue, including Brind's meta-analysis and others that support Bernardo's position on the ABC link.

In its Choosing Abortion Web page, PPFA answered the question "Does abortion cause breast cancer?" by stating,

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[6] In the "Works Cited" portion of the Anti-Choice Claims Web page, PPFA cited: "Melbye, Mads, et al. (1997). 'Induced Abortion and the Risk of Breast Cancer.' *New England Journal of Medicine*, 336(2), 81-85."

[7] In the "Works Cited" portion of the Anti-Choice Claims Web page, PPFA cited: "Lindefors Harris, Britt-Marie, et al. (1989). 'Risk of Cancer of the Breast after Legal Abortion during First Trimester: A Swedish Register Study.' *British Medical Journal*, 299 (December 9), 1430-1432."

"No. But abortion does not offer the same protection against breast cancer as a full term pregnancy."

On PPFA's Surgical Abortion Web page, a visitor could select the question "What are the health risks of abortion?", which would connect the visitor to another page that answered the question by stating, "In the first 20 weeks, abortion is much safer than giving birth." This statement, however, was followed by an explanation of eight "[c]omplications from early abortion," including death. PPFA stated that death "occurs in 1 of 100,000 abortions," and "[c]hildbirth carries seven times more risk."

Bernardo also tried to enjoin portions of PPFA's Medical and Social Health Benefits Web page. Bernardo objected to both the use of the phrase "safe, legal abortion" and the following statement:

> "Today, abortion is one of the most commonly performed clinical procedures, and the current death rate from abortion at all stages of gestation is 0.6 per 100,000 procedures. This is *eleven times safer than carrying a pregnancy to term* and nearly twice as safe as a penicillin injection [citations]."[8] (Italics added.)

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[8] PPFA cited the following two studies listed in the "Cited References" section at the end of the Medical and Social Health Benefits Web page: (1) "Paul, Maureen, et al. (1999). *A Clinician's Guide to Medical and Surgical Abortion*. New York: Churchill Livingstone"; and (2) "Gold, Rachel Benson. (1990). *Abortion and Women's Health: A Turning Point for America?* New York: The Alan Guttmacher Institute."

C. *PPSDRC's Web site and "Fact Sheets"*

PPSDRC's Internet Web site (PPSDRC's Web site) is found at <http://www.planned.org.html>. Like PPFA, PPSDRC publishes various Web site pages that address reproductive health and public affairs issues, including some that Bernardo tried to suppress in this matter. For example, PPSDRC's Web site contained a fact sheet titled "Abortion Info: Q&A: Future [Pregnancies]" (the Abortion Info Web page), which answered the question "Does abortion cause breast cancer?" by stating, "No, but abortion does not offer the protection against breast cancer that having several full-term pregnancies does."

D. *Terms of Use of Planned Parenthood's Web Sites*

Both PPFA and PPSDRC included in their Web sites a terms-of-use page notifying Web site visitors that Planned Parenthood provided the Web sites subject to the visitors' "agreement to comply with the Terms of Use." Each terms-of-use page informed visitors that the information provided on the Web sites was for the visitors' personal education only and that nothing on the Web sites constituted a recommendation for medical care. Each page also advised visitors to "[a]rm yourself with good information about sexual and reproductive health maintenance, and *visit a qualified health care provider for personal medical evaluation, counseling, and services*." (Italics added.)

E. *Bernardo's SLAPP Complaint*

In August 2001, Bernardo filed her SLAPP complaint for injunctive relief against Planned Parenthood under California's Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq., hereafter the UCL) and False Advertising

Law (Bus. & Prof. Code, § 17500 et seq., hereafter the FAL). Bernardo alleged that PPFA and PPSDRC's Internet Web sites contained "unlawful, unfair, confusing, and misleading statements/advertisements" that caused women to make critical health care decisions without full, complete, and accurate information about the safety of abortion, the safety of abortion vis- [agrave] -vis childbirth, and the "scientific/medical literature" that Bernardo believed established the existence of the ABC link.

1. *Injunctive relief requested*

In her complaint, Bernardo sought an injunction restraining Planned Parenthood from publishing statements that abortion is safe or safer than childbirth and that the weight of credible medical research has failed to establish a link between induced abortion and breast cancer. In effect, Bernardo's action thus sought to enjoin portions of PPFA's Anti-Choice Claims, Choosing Abortion, Surgical Abortion and Medical and Social Health Benefits Web pages, as well as PPSDRC's Abortion Info Web page (all of which are discussed, *ante*).

Bernardo also sought a mandatory injunction requiring Planned Parenthood to provide to all of its former and prospective abortion patients a series of statements drafted by Bernardo and her counsel that support Bernardo's view that medical research has established the existence of the claimed ABC link.[9]

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[9] Bernardo requested an injunction "restraining [Planned Parenthood and its] agents from performing abortions and abortion-related services unless they first provide the following information prior to scheduling, and/or accepting any payment for, abortions or abortion-related services to be rendered in California: [P] A large

body of published medical research implicates induced abortion as a cause of breast cancer in two ways. [P] First, abortion does not offer the protection against breast cancer provided by a first full-term pregnancy before age 30. Therefore, having an abortion results in a higher risk of getting breast cancer later in life than carrying the pregnancy to term for women under age 30 who have not yet had a full-term pregnancy. [P] Second, having an abortion increases a wom[a]n's risk of breast cancer even more than the risk is increased by delaying a first full-term pregnancy. Evidence of this additional increased breast cancer risk has been observed in most epidemiological studies in American women. There is also evidence of an even larger increase in breast cancer risk among women who have an induced abortion while a teenager, and among women who have both a family history of breast cancer and an induced abortion."

Bernardo also requested an injunction "requiring [Planned Parenthood] to provide all of their patients who received an induced abortion in California with a notice of the increased risk of breast cancer described herein so that these patients are aware of their increased risk and can seek appropriate medical monitoring and treatment. *The notice should read as follows*: [P] Our records show that you received an abortion at our clinic. We are sending you this notice to inform you that a large body of published medical research implicates induced abortion as a cause of breast cancer in two ways. [P] First, abortion does not offer the protection against breast cancer provided by a first full-term pregnancy before age 30. Therefore, having an abortion results in a higher risk of getting breast cancer later in life than carrying the pregnancy to term for women under age 30 who have not yet had a full-term pregnancy. [P] Second, having an abortion increases a woman's risk of breast cancer even more than the risk is increased by delaying a first full-term pregnancy. Evidence of this additional increased breast cancer risk has been observed in most epidemiological studies in American women. As of June 2001, 17 independent studies in the worldwide literature have substantiated the theory that induced abortion increases breast cancer risk by reporting positive associations with

2. *Brind's affidavit*

In support of these allegations, Bernardo attached to her complaint an affidavit of Joel L. Brind, Ph.D. (Brind), a professor of biology in the Department of Natural Sciences of Baruch College of the City University of New York, and the author of a paper titled, "Induced Abortion as an Independent Risk Factor for Breast Cancer: A Comprehensive Review and Meta-Analysis" (hereafter Brind's meta-analysis),[10] which was published in 1996 in the British Medical Association's *Journal of Epidemiology and Community Health*.

In his affidavit, Brind stated that of 36 independent studies published worldwide that presented specific data on induced abortion and the incidence of breast cancer, 17 had reported a statistically significant increase in the risk of breast cancer overall among women who have one or more induced abortions, and 10 had reported a risk increase that did not achieve statistical significance. He also stated that three of

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statistical significance, a technical term meaning at least 95 [percent] certainty that the association between induced abortion and increased risk of breast cancer is not due to chance. There is also evidence of an even larger increase in breast cancer risk among women who have an induced abortion while a teenager, and among women who have both a family history of breast cancer and an induced abortion. [P] If you have had an abortion you should be aware of this increased risk of breast cancer and seek appropriate medical screening and care. For more information about these studies addressing the link between induced abortion and breast cancer please contact your physician."

[10] The definition of the term "meta-analysis" is set forth in footnote 3, *ante*.

the 36 studies reported no tendency for increased or decreased risk, three reported a decrease in risk that did not achieve statistical significance, and three reported a statistically significant decrease in risk. He explained that, as he discussed in his 1996 meta-analysis, when he compiled the data for all 36 studies, using either a weighted or unweighted average, he calculated that "the risk of breast cancer among those women who had experienced an induced abortion was 30 [percent] higher than among women who had not, independently of the effect due to abortion's delay of first full-term pregnancy," and since the lifetime risk of breast cancer for an average American woman is between 10 and 12 percent, this 30 percent increase "amounts in absolute terms to at least a three percent, or 3 in 100, excess risk of developing breast cancer."

Brind also opined in his affidavit that PPFA's Anti-Choice Claims Web page is "a thoroughly biased and misleading presentation of the scientific literature on this subject," which "creates the untrue and/or misleading impression that the preponderance of the scientific analysis supports the assertion that there is no link between induced abortion and increased risk of breast cancer." He challenged numerous specific statements contained in the Anti-Choice Claims Web page.

Brind opined that Planned Parenthood's answer of "No" to the question "Does abortion cause breast cancer?" was "untrue and/or misleading, because the overwhelming preponderance of the evidence indicates that abortion does cause breast cancer, both by removing the protection against breast cancer to be gained by completing the pregnancy already in progress, and by increasing the risk of breast cancer independently of the loss of this protective effect." He also opined that the Planned Parenthood Web site statements he challenged were "likely to mislead reasonable members of the public as to the safety of abortion, the safety of abortion

vis- [agrave] -vis childbirth, and the link between induced abortion and breast cancer."

F. *Planned Parenthood's Special Motion To Strike Under the Anti-SLAPP Statute*

Planned Parenthood filed a special motion under the anti-SLAPP statute to strike Bernardo's complaint. Planned Parenthood argued that the complaint was a meritless SLAPP intended to use California's consumer protection statutes (Bus. & Prof. Code, §§ 17200 et seq. & 17500 et seq.) to thwart Planned Parenthood from exercising its constitutional right to speak about abortion; stop it from "providing free information on the [W]orld [W]ide [W]eb regarding abortion, an issue of great public concern, and on the related issue of breast cancer and abortion"; force it to adopt Bernardo's view of medicine on Planned Parenthood's own Web sites and tell women that abortion causes breast cancer; and "frighten women into refraining from exercising a constitutional right to reproductive choice" based on "very questionable science" and Bernardo's "anti-abortion agenda."

Planned Parenthood also argued that Bernardo could not meet her burden under the anti-SLAPP statute (section 425.16, subd. (b)(1), hereafter § 425.16(b)(1))[11] of showing a probability that she would prevail on any of her claims because (1) Planned Parenthood advised all visitors to its Web

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[11] Section 425.16(b)(1) provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

sites in the terms of use (discussed, *ante*) that the health information provided on the Web sites was for the visitors' personal education only; (2) the information did not concern any product or service within the meaning of the UCL, nor did it concern or advertise any product or service within the meaning of the FAL, and thus did not fall within the ambit of these consumer protection statutes; and (3) even if it did, the Web site health information was supported by ample peer-reviewed scientific studies as shown by the supporting expert declarations of four health professionals.

In support of the motion to strike, Planned Parenthood submitted the declarations of David B. Preskill, M.D., the Chief of Service for Obstetrics and Gynecology at Southern California Kaiser Permanente in San Diego; Georgia Robbins Sadler, Ph.D., Associate Clinical Professor of Surgery at the University of California, San Diego (UCSD) School of Medicine, and the Associate Director for Outreach at the UCSD Cancer Center; Steven R. Drosman, M.D., the former Chief of the Obstetrics and Gynecology Section of Sharp Memorial Hospital and currently the Chief of Staff for Sharp Mary Birch Hospital for Women, at Sharp Memorial Hospital and Polly A. Newcomb, Ph.D., who is a member of the Fred Hutchinson Cancer Research Center in Seattle, Washington, a professor of epidemiology at the University of Washington School of Public Health, and an associate editor who provides editorial service to 18 peer-review epidemiology journals, including the *New England Journal of Medicine* and the *American Journal of Epidemiology*.

Planned Parenthood filed a written request that the court take judicial notice of the fact that abortion is one of the most controversial political issues in our nation.

Bernardo opposed the special motion to strike, asserting that this case is not about the right to abortion. Bernardo contended the motion should be denied on two main grounds: (1) Planned Parenthood's speech was false and misleading, such speech was not entitled to legal protection, and thus Planned Parenthood had failed to make the requisite prima facie showing that they were engaged in protected activity within the meaning of section 425.16; and (2) Bernardo was able to make a prima facie showing of a probability of succeeding on the merits because Planned Parenthood Web site statements were made in connection with their offer of abortion services so as to constitute advertising within the meaning of the UCL and FAL, and Bernardo had "all but conclusive evidence" that those statements misled the public about the safety of abortion, the safety of abortion vis-[agrave] -vis childbirth, and the evidence showing that induced abortion increases the risk of breast cancer.

In support of her opposition, Bernardo submitted the declarations of all three individual appellants; Brind's declaration; and the declaration of five medical doctors, "one from each medical specialty required to address the increased risk of breast cancer caused by induced abortion over the life of the woman," who all opined that induced abortion causes increased risk of breast cancer: Elizabeth Shadigian, M.D., a board certified obstetrician/gynecologist engaged in clinical practice and teaching at the University of Michigan, School of Medicine; Jane Anderson, M.D., a board certified pediatrician teaching at the University of California, San Francisco; Chris Kahlenborn, M.D., a board certified physician of internal medicine engaged in clinical practice and epidemiological research who has published on the ABC link; Jose Bufill, M.D. (Bufill), who studied medicine at the University of Navarre in Spain, and is practicing oncology and hematology and teaching at the Indiana University School

of Medicine; and Angela Lanfranchi, M.D., a surgeon specializing in breast surgery, and a clinical professor at Robert Wood Johnson Medical School.

G. *Order Granting Planned Parenthood's Anti-SLAPP Motion To Strike*

The court granted Planned Parenthood's motion to strike Bernardo's complaint under the anti-SLAPP statute on the ground that Bernardo had failed to show the requisite probability of prevailing on the merits of the complaint and obtaining the injunctive relief she sought. Specifically, the court found that the challenged statements in Planned Parenthood's Web pages "[could not] be construed as pure commercial speech or pure advertisement" and, even if they could be so construed, Bernardo had failed to present sufficient evidence to show a probability of prevailing on the UCL and FAL claims that Planned Parenthood's Web site statements were unlawful, that they constituted an unfair or fraudulent business practice, and that they also constituted false or deceptive advertising. The court noted that contrary to Bernardo's argument that Planned Parenthood's Web sites were deceptive by failing to recognize the "protective effect" against breast cancer that a full-term pregnancy provides, Bernardo had acknowledged Planned Parenthood's statement (in the Choosing Abortion and Abortion Info Web pages) that "abortion does not offer the same protection against breast cancer as a full term pregnancy." The court also noted Bernardo's allegation that Planned Parenthood had made a false statement of fact by claiming that abortion is safer than childbirth, but found that this allegation was centered on Bernardo's position that abortion causes breast cancer and that her own evidence showed there were two "camps of thought" and an "on-going debate in the scientific community" on the issue of whether there is link between induced abortion and

breast cancer. The court further found that Planned Parenthood had not failed to disclose (in its Anti-Choice Claims Web page) that numerous studies supported Bernardo's position that induced abortions increase a woman's risk of breast cancer. In appeal No. D040186, Bernardo has appealed the order granting Planned Parenthood's section 425.16 motion to strike.

H. *Order Awarding Attorney Fees to Planned Parenthood*

Planned Parenthood brought a motion for a mandatory award of attorney fees under section 425.16(c) in the amount of $77,835.25. Bernardo opposed the motion, claiming the lawsuit was not a "sham"; that Planned Parenthood was seeking an improper enhancement on a contingency fee basis that would punish Bernardo's counsel in violation of his due process rights to notice; and that an award of fees under section 425.16(c) would violate Bernardo's rights under the United States and California Constitutions to petition the government for redress of grievances and exercise free speech in connection with a public issue, as well as Bernardo's due process right to meaningful notice as to when mandatory costs and fees will be levied, and the guarantee of equal protection in that section 425.16(c) "functions as a content-based penalty for certain suits and creates an invidious distinction between classes of litigants and causes which is not narrowly tailored to achieve any compelling governmental interest."

The court issued an order granting the attorney fees motion and awarding attorney fees to Planned Parenthood in the sum of $77,835.25. In appeal No. D040866, Bernardo has appealed that order.

DISCUSSION

I.

BERNARDO'S APPEAL FROM THE ORDER GRANTING PLANNED PARENTHOOD'S MOTION TO STRIKE THE COMPLAINT UNDER THE ANTI-SLAPP STATUTE

For reasons we shall explain, we independently conclude that Planned Parenthood was entitled to a judgment of dismissal under the anti-SLAPP statute because in opposing Planned Parenthood's motion to strike under section 425.16, Bernardo failed to state and substantiate a legally sufficient claim and thus failed to meet her statutory burden of showing a reasonable probability of prevailing on the claims for injunctive relief asserted in her complaint.

A. *Standard of Review*

"We review the trial court's rulings on a SLAPP motion independently under a de novo standard of review." (*Kajima Engineering & Consruction., Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 929.)

B. *Overview of Section 425.16*

In *Dowling, supra*, 85 Cal.App.4th at page 1414, this court explained that "[a] SLAPP lawsuit is generally defined as a 'meritless suit filed primarily to chill the defendant's exercise of First Amendment rights.' [Citation.] SLAPP suits 'are brought, not to vindicate a legal right, but rather to interfere with the defendant's ability to pursue his or her interests. Characteristically, the SLAPP suit lacks merit; it will achieve its objective if it depletes defendant's resources

or energy. The aim is not to win the lawsuit but to detract the defendant from his or her objective, which is adverse to the plaintiff. [Citation.]' [Citation.]"

As we also observed in *Dowling*, "[s]ection 425.16 was enacted in 1992 to deter and prevent SLAPP suits, and is 'designed to protect citizens in the exercise of their First Amendment constitutional rights of free speech and petition.' [Citation.] The anti-SLAPP statute 'is California's response to the problems created by meritless lawsuits brought to harass those who have exercised these rights.' [Citation.] 'California enacted section 425.16 to provide a procedural remedy to resolve such a suit expeditiously.' [Citation.]" (*Dowling, supra,* 85 Cal.App.4th at p. 1414, italics omitted.)

The Legislature expressly set forth the intent and purpose underlying the anti-SLAPP statute in section 425.16, subdivision (a), which provides: " The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly."

We further explained in *Dowling* that " 'the common features of SLAPP suits are their lack of merit and chilling of defendants' valid exercise of free speech and the right to petition the government for a redress of grievances.' [Citation.] 'Section 425.16 was intended to address those features by providing a fast and inexpensive unmasking and dismissal of SLAPP's. [Citations.]' [Citation.]" (*Dowling, supra*, 85 Cal.App.4th at pp. 1414-1415.)

1. Special motion to strike SLAPP suits

"[Section 425.16(b)(1)] authorizes a special motion to strike a SLAPP suit, and expressly makes subject to such a motion '[a] cause of action against a person *arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue* ..., unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.' " (*Dowling, supra*, 85 Cal.App.4th at p. 1415, italics added by *Dowling*.)

In *Dowling*, we noted that "[s]ubdivision (e) of section 425.16 expressly defines the First Amendment activity from which a cause of action must arise within the meaning of section 425.16[(b)(1)] ... in order to be the proper subject of a special motion to strike under the anti-SLAPP statute. [Citation.] Subdivision (e), as amended in 1997, provides that the phrase ' "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue;" ' as used in section 425.16, includes four categories of conduct, which are separately defined in the subdivision's four clauses: [¶] *1)* '[A]ny written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law' (§ 425.16, subd. (e)(1)); [¶] 2) '[A]ny written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law' (§ 425.16, subd. (e)(2)); [¶] 3) '[A]ny written or oral statement or writing made in a place open to the public or a public forum *in connection with an issue of public interest*' (§ 425.16, subd.

(e)(3), [italics added by *Dowling*]); or [¶] 4) '[A]ny other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest' (§ 425.16, subd. (e)(4))." (*Dowling, supra*, 85 Cal.App.4th at pp. 1415-1416, fn. omitted.)

a. *Burdens of proof*

In *Navellier v. Sletten* (2002) 29 Cal.4th 82 (*Navellier*), the California Supreme Court explained the two-step process that a court must follow in determining whether an action is a SLAPP within the meaning of section 425.16. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. (§ 425.16[(b)(1)].) 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e)' [citation]. If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. (§ 425.16[(b)(1)]; see generally *Equilon Enterprises v. Consumer Cause. Inc.* (2002) 29 Cal.4th 53, 67[(*Equilon*)].)" (*Navellier, supra,* 29 Cal.4th at p. 88.)

The *Navellier* court also explained that "in order to establish the requisite probability of prevailing (§ 425.16[(b)(1)]), the plaintiff need only have '"stated and substantiated a legally sufficient claim."' [Citation.] 'Put another way, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." ' [Citation.] [¶] Only a cause of action that satisfies

both prongs of the anti-SLAPP statute--i.e., that arises from protected speech or petitioning *and* lacks even minimal merit--is a SLAPP, subject to being stricken under the statute." (*Navellier, supra,* 29 Cal.4th at pp. 88-89.)

"In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) "[T]hough the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim. [Citation.]" (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.)

C. *Analysis*

The record shows Bernardo did not and cannot meet her statutory burden under the anti-SLAPP statute of showing a reasonable probability of prevailing on the merits of her claims for injunctive relief because (1) Bernardo's own evidence shows that Planned Parenthood's challenged statements about the claimed ABC link were expressions of opinion about an issue of genuine scientific debate, and those statements were noncommercial speech fully protected under the First Amendment to the United States Constitution and not actionable under either the UCL or FAL; (2) Bernardo's challenge to Planned Parenthood's statements regarding the safety of abortion failed as a matter of law because her own evidence showed that this challenge was based on the unsupported premise that the claimed ABC link was an established scientific fact; and (3) were we to assume Planned Parenthood's Web site statements were commercial speech that consisted of or were based on statements of fact, not

opinion, Bernardo failed to show a reasonable probability of prevailing on the merits of her claims that the statements were unlawful, unfair or fraudulent within the meaning of Business and Professions Code section 17200 or constituted false advertising within the meaning of Business and Professions Code section 17500. We reject Bernardo's contentions that the court improperly weighed the evidence and improperly applied section 425.16 in violation of Bernardo's constitutional rights.

1. *The challenged statements are fully protected noncommercial speech*

Bernardo cannot show a probability of prevailing on the merits of her claims because her own evidence shows Planned Parenthood's challenged speech regarding the central disputed issue of whether induced abortion causes breast cancer was noncommercial speech entitled to full First Amendment protection, and thus was not actionable under Business and Professions Code sections 17200 or 17500.

Commercial speech is "usually defined as speech that does no more than propose a commercial transaction." (*United States v. United Foods, Inc.* (2001) 533 U.S. 405, 409, citing *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.* (1976) 425 U.S. 748, 762.) The United States Supreme Court has held that the federal Constitution "accords less protection to commercial speech than to other constitutionally safeguarded forms of expression." (*Bolger v. Youngs Drug Products Corp.* (1983) 463 U.S. 60, 64-65 (*Bolger*).)

In *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 952 (*Nike*), the California Supreme Court explained that "[f]or noncommercial speech entitled to full First Amendment

protection, a content-based regulation is valid under the First Amendment only if it can withstand strict scrutiny, which requires that the regulation be narrowly tailored (that is, the least restrictive means) to promote a compelling government interest. [Citations.]" We note that Planned Parenthood asserts, and the record shows, that Bernardo does not claim that Planned Parenthood's speech may be regulated under Business and Professions Code sections 17200 or 17500 if it is noncommercial speech.

Here, Bernardo's own evidence in opposition to Planned Parenthood's motion to strike shows that Planned Parenthood's speech on the claimed ABC link is noncommercial speech entitled to full First Amendment protection. Bernardo's complaint alleged that PPFA and PPSDRC's Internet Web sites contained "unlawful, unfair, confusing, and misleading statements/advertisements" in violation of Business and Professions Code sections 17200 and 17500 that caused women to make critical health care decisions without full, complete, and accurate information about the safety of abortion in general, the safety of abortion vis- [agrave] -vis childbirth, and the scientific/medical literature that Bernardo claims establishes a link between induced abortion and breast cancer.

In opposing Planned Parenthood's motion to strike the complaint under the anti-SLAPP statute, Bernardo submitted photocopies of the various challenged documents that Planned Parenthood published on its Web sites: (1) PPFA's Anti-Choice Claims Web page; (2) PPFA's Choosing Abortion Web page; (3) PPFA's Surgical Abortion Web page; (4) PPFA's Medical and Social Health Benefits Web page; and (5) PPSDRC's Abortion Info Web page. On appeal, Bernardo maintains she met her burden of showing a probability of prevailing on her claim that Planned Parenthood made false

statements of fact on those Web pages by claiming that abortion is safer than childbirth and that induced abortion does not cause breast cancer.

The evidence submitted by Bernardo shows, however, that none of Planned Parenthood's challenged Web pages proposed a commercial transaction in its contents. Rather, they were all educational in nature and asserted Planned Parenthood's positions on disputed scientific and medical issues of public interest with which Bernardo strenuously disagreed.[12] For example, PPFA's Anti-Choice Claims Web page, which addressed the claimed ABC link that was of central importance in Bernardo's action against Planned Parenthood, stated PPFA's "position" that the ABC link is "a theory [that] has not been borne out by research"; explained the ABC link "theory"; and asserted that the principal promoters of that "theory" opposed abortion.[13] The Web page also contained

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[12] Bernardo's own evidence confirmed Planned Parenthood's position that the claimed ABC link is the controversial subject of a genuine scientific debate. In opposition to Planned Parenthood's motion to strike, Bernardo submitted the declaration of Jose Bufill, M.D., who stated in part: "*Two schools define the scientific debate regarding the association of induced abortion with subsequent development of breast cancer*. One group argues that the weight of scientific data indicates that induced abortion places women at risk for breast cancer .... They offer evidence from a wide range of scientific perspectives ... to offer a coherent, unified argument in support of a causal association. The other group ... argues that no such association exists. The arguments they offer in support of their *opinion* center on a critique of the statistical methods used in the epidemiologic studies specifically addressing the association. ..." (Italics added.)

[13] PPFA stated that "[t]he link between induced abortion and breast cancer is a theory whose principal promoters oppose

a review of some of the many studies of the alleged ABC link published over the previous 20 years, including some, such as Brind's meta-analysis (see fn. 4, *ante*), that support Bernardo's position that such a link exists, and others that supported PPFA's position on the ABC link issue, such as a study of 1.5 million women, published in 1997 by the *New England Journal of Medicine* (see fn. 6, *ante*), which, according to PPFA, found no overall connection between abortion and breast cancer. The Anti-Choice Claims Web page also discussed research regarding various factors that can render a study of the claimed ABC link unreliable and concluded with a "Works Cited" bibliography that cited 32 published studies on the ABC link issue, including Brind's meta-analysis and others that support Bernardo's position on the ABC link. The foregoing shows that PPFA's Anti-Choice Claims Web page was educational, not commercial, in nature.

In support of the contention that Planned Parenthood's statements are commercial speech, Bernardo points to the authenticated photocopies of Planned Parenthood's Web sites that she submitted in opposition to the motion to strike, which show (1) that on "[v]irtually every web page," PPFA provided "health info," "health centers" and "sexual health"

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abortion regardless of its safety. The theory has not been borne out by research." It explained the ABC link "theory": "The theory linking pregnancy termination and breast cancer is based on the hormonal disruption that occurs when a woman's pregnancy is interrupted. Pregnancy initiates a surge of sex hormones (estrogen, progesterone, and prolactin), which leads to differentiation of the cells in the breast glands in preparation for lactation. ... Adherents of this theory claim that interruption of the first trimester of a first pregnancy causes a cessation of cell differentiation that may result in a subsequent increase in the risk of cancerous growth in these tissues."

hyperlinks that provided Web site visitors with access to sexual health information and the locations of affiliated health centers (including PPSDRC), as well as a toll-free telephone number that visitors could call to schedule an appointment; and (2) that PPSDRC's Web pages provided visitors with an opportunity to obtain payment information and clinic locations and to make an appointment. The brief text of the hyperlinks (such as "health info," "health centers" and "sexual health") on the various Web pages did not advertise or promote any services provided by clinics affiliated with Planned Parenthood. While the toll-free number provided to Web site visitors a means for scheduling an appointment for medical services, it is significant that both PPFA and PPSDRC included in their Web sites a terms-of-use page notifying visitors that Planned Parenthood was providing the Web sites subject to the visitors' "agreement to comply with the Terms of Use." Each terms-of-use page informed visitors that the information provided on Planned Parenthood's Web sites was for the visitors' "*personal education*, but nothing on this site constitutes a recommendation for medical care ...." (Italics added.) Each page also advised visitors to "[a]rm yourself with good information about sexual and reproductive health maintenance, and visit a qualified health care provider for personal medical evaluation, counseling, and services."

Bernardo also relies on the fact that PPSDRC and other affiliates of PPFA provide abortion and other services from which PPFA and the affiliates derive revenue. However, any economic motivation that Planned Parenthood may have had in publishing the challenged Web site speech regarding the claimed ABC link and the safety of abortion would be insufficient by itself to turn the statements into commercial speech. In *Bolger, supra*, 463 U.S. 60, a manufacturer and distributor of contraceptives brought an action for declaratory and injunctive relief challenging a federal statute that

prohibited the unsolicited mailing of contraceptive advertisements. (*Id.* at pp. 61-63.) The manufacturer decided to undertake a campaign of mailing to the public on an unsolicited basis some informational pamphlets (among other things) that not only promoted its products, but also contained discussions of important public issues such as venereal disease and family planning. (*Id.* at pp. 62, 67-68.) The Supreme Court found that most of the manufacturer's mailings fell "within the core notion of commercial speech--'speech which does "no more than propose a commercial transaction."' [Citations.]" (*Id.* at p. 66.) Although the *Bolger* court held that the mailings constituted commercial speech, noting that the informational pamphlets were "conceded to be advertisements" (*ibid.*), the high court explained that "the fact that [the manufacturer] ha[d] an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech. [Citations.]" (*Id.* at p. 67.) Similarly here, any "economic motivation" Planned Parenthood may have had in publishing the Web site speech that Bernardo challenges in this case would be insufficient by itself to turn the statements into commercial speech actionable under the UCL and FAL.

Even were we to assume that the toll-free number and Planned Parenthood's hyperlinks to information about specific clinics and services constituted commercial speech, the noncommercial speech published in the various Web pages would still receive full First Amendment protection. In *Pacific Gas & Elec. Co. v. Public Util. Comm'n* (1986) 475 U.S. 1, 9, the United States Supreme Court held that a utility's newsletter, which was distributed to ratepayers in the monthly billing envelopes and the contents of which ranged from political editorials to energy saving tips and billing information, "extend[ed] well beyond speech that proposes a business transaction ... [citations], and include[d] the kind of

discussion of 'matters of public concern' that the First Amendment both fully protects and implicitly encourages. [Citation.]" Under similar reasoning, Planned Parenthood's noncommercial speech in the various Web pages at issue here was fully protected under the First Amendment despite any claimed contiguous commercial speech set forth directly or indirectly in the hyperlinks or in the text accompanying the toll-free telephone number, discussed, *ante*.

Bernardo also relies on *Nike, supra*, 27 Cal.4th 939, as supporting her contention that Planned Parenthood's speech is commercial. Bernardo's reliance on *Nike*, however, is misplaced.

In *Nike*, the plaintiff, acting on behalf of the general public, brought suit under the UCL and FAL alleging that the defendant corporation, Nike, Inc. (Nike), responded to public criticism and induced consumers to continue to buy its products by making false statements of fact about its labor practices and about working conditions in factories that made its products. (*Nike, supra*, 27 Cal.4th at pp. 945, 946-947, 949-950.) Specifically, the plaintiff alleged that Nike made statements in press releases, in letters to newspapers, in a letter to university presidents and athletic directors, and in other documents distributed for public relations purposes to the effect that workers who made Nike products were "protected from physical and sexual abuse, that they [were] paid in accordance with applicable local laws and regulations governing wages and hours, that they [were] paid on average double the applicable local minimum wage, that they received a 'living wage,' that they received free meals and health care, and that their working conditions [were] in compliance with applicable local laws and regulations governing occupational health and safety." (*Id.* at pp. 947-948.) The California Supreme Court reversed the Court of Appeal's judgment

affirming the trial court's judgment of dismissal after the trial court sustained Nike's demurrer without leave to amend on the ground Nike's statements were constitutionally protected noncommercial speech. (*Id.* at pp. 948-949, 970.)

In holding that Nike's speech was commercial, the Supreme Court articulated and applied a "limited-purpose test" (the *Nike* test), stating that "*when a court must decide whether particular speech may be subjected to laws aimed at preventing false advertising or other forms of commercial deception*, categorizing a particular statement as commercial or noncommercial speech requires consideration of three elements: the speaker, the intended audience, and the content of the message." (*Nike, supra,* 27 Cal.4th at p. 960, original italics.) The *Nike* court explained that "[i]n typical commercial speech cases, the *speaker* is likely to be someone engaged in commerce--that is, generally, the production, distribution, or sale of goods or services or someone acting on behalf of a person so engaged, and the *intended audience* is likely to be actual or potential buyers or customers of the speaker's goods or services, or persons acting for actual or potential buyers or customers, or persons (such as reporters or reviewers) likely to repeat the message to or otherwise influence actual or potential buyers or customers." (*Ibid.*, original italics.) With respect to the "content-of-the-message" element of the *Nike* test, the high court stated that "the *factual* content of the message should be *commercial in character*. In the context of regulation of false or misleading advertising, this typically means that the speech consists of *representations of fact about the business operations, products, or services of the speaker* (or the individual or company that the speaker represents), *made for the purpose of promoting sales of, or other commercial transactions in, the speaker's products or services*." (*Id.* at p. 961, italics added.) The court rephrased its *Nike* test by stating that "in relation to regulations aimed at

protecting consumers from false and misleading promotional practices, *commercial speech must consist of factual representations* about the business operations, products, or services of the speaker (or the individual or company on whose behalf the speaker is speaking), made for the purpose of promoting sales of, or other commercial transactions in, the speaker's products or services." (*Id.* at p. 962, italics added.) Thus, the three elements of the *Nike* test are (1) a commercial speaker, (2) an intended commercial audience, and (3) representations of fact of a commercial nature. (See *id.* at p. 964.) The high court stressed that the UCL and FAL "do not suppress points of view but instead suppress false and misleading statements of fact." (*Nike, supra*, 27 Cal.4th at p. 967.)

Applying the foregoing elements of the *Nike* test to the record presented in this appeal, we conclude that Bernardo failed to show a reasonable probability of prevailing on her contention that Planned Parenthood's speech is commercial under that test. Assuming without deciding that Planned Parenthood is a commercial speaker on the ground it receives revenue from affiliated health centers, Bernardo has failed to show that Planned Parenthood's Web site statements regarding the claimed ABC link and the safety of abortion constitute representations of fact of a commercial nature within the meaning of the *Nike* test. In *Nike*, the Supreme Court held that this third element of the *Nike* test was satisfied because "[i]n describing its own labor policies, and the practices and working conditions in factories where its products are made, Nike was making *factual representations about its own business operations*." (*Nike, supra*, 27 Cal.4th at p. 963, italics added.) The court further explained that "[i]n speaking to consumers about working conditions and labor practices in the factories where its products are made, *Nike addressed matters within its own knowledge*. The wages paid

to the factories' employees, the hours they work, the way they are treated, and whether the environmental conditions under which they work violate local health and safety laws, are all matters likely to be within the personal knowledge of Nike executives, employees, or subcontractors. Thus, *Nike was in a position to readily verify the truth of any factual assertions it made on these topics.*" (*Ibid.*)

Here, however, Bernardo sought to enjoin not readily verifiable *factual* assertions about matters within Planned Parenthood's own knowledge, but Planned Parenthood's statements of *opinion* about the claimed ABC link that one of Bernardo's own experts, Bufill, conceded was the subject of "[t]wo schools" of "scientific debate." (See fn. 12, *ante*).

Bernardo does not claim, nor can she, that the claimed ABC link, a matter of genuine scientific debate, is a matter that is within Planned Parenthood's "own knowledge" within the meaning of the *Nike* test. The evidence of the Anti-Choice Claims Web page submitted by Bernardo shows that PPFA stated therein under the subheading, "**The Planned Parenthood Position is That Abortion Poses no Demonstrated Health Risks**" (original boldface), that "[t]he link between induced abortion and breast cancer is a theory" that "has not been borne out by research." The reference to Planned Parenthood's "position" indicates that Planned Parenthood was expressing its *opinion* about this disputed "theory." Bufill, in his declaration filed by Bernardo in opposition to Planned Parenthood's motion to strike the complaint under the anti-SLAPP statute, specifically discussed the "school[]" (to which Planned Parenthood indisputably belongs) that argues there is no causal association between induced abortion and breast cancer, and stated that "[t]he arguments they offer in support of their *opinion* center on a critique of the statistical methods used in the epidemiologic

studies specifically addressing the association ...." (Italics added.) Thus, Bernardo's expert witness evidence shows that the position taken on the ABC link issue by the school to which Planned Parenthood belongs constitutes an opinion, not a representation of fact.

Bernardo has also failed to show that the intended audience of Planned Parenthood's Web site speech was "likely to be actual or potential buyers or customers" of the health services of the affiliated Planned Parenthood centers. (See *Nike, supra*, 27 Cal.4th at p. 960.) The record shows that Planned Parenthood's statements were published on the Internet, on Web sites accessible by the general public, and were not directed to any particular audience. Because Planned Parenthood's challenged statements about the claimed ABC link were statements of opinion to the general public about matters not within its own personal knowledge, they were not actionable under Business and Professions Code sections 17200 and 17500. (*Nike, supra,* 27 Cal.4th at pp. 962, 964.)

Bernardo has also failed to show a probability of prevailing on her claim that Planned Parenthood's speech concerning the safety of abortion constituted commercial speech that was actionable under the UCL and FAL. In her complaint Bernardo challenged (1) PPFA's statement in its Surgical Abortion Web page that "[i]n the first 20 weeks, abortion is much safer than giving birth"; (2) PPFA's statements in its Medical and Social Health Benefits Web page that "the current death rate from abortion at all stages of gestation is 0.6 per 100,000 procedures," and "[t]his is eleven times safer than carrying a pregnancy to term and nearly twice as safe as a penicillin injection"; and (3) PPSDFC's statement in its Abortion Info Web page that "abortion is about twice as safe as having your tonsils out and is safer than childbirth,"

and "abortion is 11 times safer than giving birth up to the 18th week of pregnancy."

On appeal, Bernardo contends her evidence shows that these statements about the safety of abortion are statements of fact, not opinion, and that they are false. This contention, however, is predicated on evidence she submitted in opposition to Planned Parenthood's motion to strike, which she maintains established that induced abortion causes breast cancer. Specifically, Bernardo asserts in her opening brief that "[Planned Parenthood's] statements of fact are false because *induced abortion does cause breast cancer and, as a result, abortion is not safer than childbirth.*" (Italics added.) Bernardo also states that "[Planned Parenthood's] comparison of mortality rates of abortion and childbirth is false and misleading because it does not factor in deaths resulting from the abrogation of the protective effect[14] caused by termination of a pregnancy via induced abortion and resulting in breast cancer deaths."

In determining whether Bernardo has established a probability of prevailing on her claims under Business and Professions Code sections 17200 and 17500 regarding Planned Parenthood's statements about the safety of abortion, our analysis thus necessarily focuses again on Planned Parenthood's published *opinion* that credible scientific evidence has not established that induced abortion increases the risk of breast cancer. Bernardo's claim that Planned

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[14] Bernardo attempts to define the term "protective effect" on appeal by stating in her opening brief that "[t]he role of a first full term pregnancy in reducing long term risk of breast cancer (i.e., the *'protective effect'*) is a medical fact beyond dispute as is the abrogation of the protective effect (and resulting increase in breast cancer risk) caused by the decision to abort." (Italics added.)

Parenthood's statements about the safety of abortion are false is based solely upon her claims that (1) the ABC link is an established scientific fact, and (2) Planned Parenthood has misrepresented the safety of abortion by failing to "factor in deaths resulting from the abrogation of the protective effect caused by termination of pregnancy via induced abortion and resulting in breast cancer deaths." However, as already discussed, Bernardo's own evidence established that the ABC link is *not* an established scientific fact because, according to one of her own expert witnesses (Bufill), it is the disputed subject of both a genuine scientific debate and of opposing opinions held by two schools (see fn. 12, *ante*). Bernardo's own evidence also shows that she belongs to the school that believes the ABC link is an established scientific fact, and Planned Parenthood belongs to the school that is of the opinion that it is not an established scientific fact.

We conclude the court properly found that Planned Parenthood's challenged Web site speech is not commercial speech because "[Planned Parenthood's] statements are not made in connection with an offer to sell abortion services, are not 'promotional' of abortion and/or do not propose a 'commercial transaction.' [Citations.] Rather, [Planned Parenthood's] statements [are] educational and/or informative in nature, as opposed to advocating and or 'advertising' (in the sense of inducing or offering a financial transaction) abortion services." Under any recognized test for commercial speech, including the *Nike* test on which Bernardo relies, Bernardo has failed to show a reasonable probability of prevailing on the merits of her claims that Planned Parenthood's challenged Web site speech is commercial or that its statements concerning the claimed ABC link and the safety of abortion are false, misleading or deceptive representations of fact that are actionable under Business and Professions Code sections 17200 and 17500.

2. *Assuming Planned Parenthood's statements were statements of fact, not opinion, and commercial speech, Bernardo has failed to show a reasonable probability of prevailing on her claims that the statements violated the UCL or FAL*

Even if Planned Parenthood's Web site statements were deemed to be commercial speech as representations of fact rather than expressions of opinion concerning the claimed ABC link, Bernardo's own evidence shows that she failed to establish a reasonable probability of prevailing on the merits of her claims that the statements violated Business and Professions Code sections 17200 and 17500 as alleged in her complaint.

a. *UCL*

California's unfair competition law "prohibits unfair competition, which is defined as 'any *unlawful, unfair or fraudulent* business act or practice ....' ([Bus. & Prof. Code,] § 17200.) 'Because Business and Professions Code section 17200 is written in the disjunctive, it establishes three varieties of unfair competition--acts or practices which are *unlawful, or unfair, or fraudulent*.' [Citation.]" (*Shvarts v. Budget Group, Inc.* (2000) 81 Cal.App.4th 1153, 1157 [97 Cal. Rptr. 2d 722].) Citing Business and Professions Code section 17204,[15] the Supreme Court in the *Nike* case explained

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[15] Business and Professions Code section 17204 provides: "Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney or by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or any city attorney of

that "[n]ot only public prosecutors, but also 'any person acting for the interests of ... the general public,' may bring an action for relief under the UCL." (*Nike, supra*, 27 Cal.4th at pp. 949-950.) The *Nike* court also explained that "[u]nder this provision, a private plaintiff may bring a UCL action even when 'the conduct alleged to constitute unfair competition violates a statute for the direct enforcement of which there is no private right of action.' [Citation.]" (*Id.* at p. 950.)

i. *"Unlawful" business practice or act*

An "unlawful" business practice or act within the meaning of the UCL "is an act or practice, committed pursuant to business activity, that is at the same time *forbidden by law*. [Citation.]" (*Klein v. Earth Elements, Inc.* (1997) 59 Cal.App.4th 965, 969.) The California Supreme Court has explained that "[b]y proscribing 'any unlawful' business practice, '[Business and Professions Code] section 17200 "borrows" violations of other laws and treats them as unlawful practices' that the unfair competition law makes independently actionable. [Citation.]" (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 (*Cel-Tech*).)

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a city, or city and county, having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor or, with the consent of the district attorney, by a city attorney in any city and county in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by *any person acting for the interests of* itself, its members or *the general public*." (Italics added.)

Here, as the court properly found, Bernardo "failed to state which statute, regulation or law (whether federal, state or common law) [Planned Parenthood] allegedly violated." On appeal, Bernardo again fails to identify any statutory, regulatory or decisional law that Planned Parenthood allegedly violated. We thus conclude that Bernardo failed to meet her burden of stating and substantiating a legally sufficient claim of unlawfulness. (*Navellier, supra*, 29 Cal.4th at p. 88.)

ii. *"Unfair" business practice or act*

The court noted that "[w]ith regard to the definition of 'unfair' under the UCL ... the law is unclear as to which definition of 'unfair' applies in consumer cases [after] *Cel-Tech* [*supra,*] 20 Cal.4th 163." One commentator has stated in reference to *Cel-Tech* that "[t]he California Supreme Court has apparently decided to leave for another day, or leave for the appellate courts, the task of formulating a definition of 'unfair' in consumer cases." (Stern, Bus. & Prof. C. § 17200 Practice (The Rutter Group 2003) ¶ 3:119, p. 3-28.) In *Gregory v. Albertson's, Inc.* (2002) 104 Cal.App.4th 845, 851 (*Gregory*), a post-*Cel-Tech* decision, the Court of Appeal recently stated that "[t]he term unfair is not precisely defined in the statute, and the courts have struggled to come up with a workable definition."

Referring to the term "unfair" as used in the UCL, the California Supreme Court in *Cel-Tech* stated that "[a] few Courts of Appeal have attempted a definition. (E.g., *People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal. App. 3d 509, 530 ['[A]n "unfair" business practice occurs when it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.']; *State Farm Fire & Casualty Co. v. Superior Court* 1996 45 Cal.App.4th 1093,

1104 ['"the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim"'].)" (*Cel-Tech, supra*, 20 Cal.4th at p. 184.)

In *Cel-Tech*, which in part involved an action under the UCL by sellers of cellular telephones against a direct competitor that allegedly sold such telephones below cost to gain subscribers for its cellular service, the Supreme Court adopted a new "test" for determining whether a business practice or act is "unfair" within the meaning of the UCL: "When a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes [Business and Professions Code] section 17200, the word 'unfair' in that section means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." (*Cel-Tech, supra*, 20 Cal.4th at p. 187, fn. omitted.) In a footnote, however the high court held that this new definition does not apply to consumer cases, stating in part: "This case involves an action by a competitor alleging anticompetitive practices. Our discussion and this test are limited to that context. Nothing we say relates to actions by consumers or by competitors alleging other kinds of violations of the unfair competition law such as 'fraudulent' or 'unlawful' business practices or 'unfair, deceptive, untrue or misleading advertising.'"(*Id.* at p. 187, fn. 12.)

Nevertheless, some post-*Cel-Tech* state appellate decisions have held that the new *Cel-Tech* test applies even to consumer cases. In *Schnall v. Hertz Corp.* (2000) 78 Cal.App.4th 1144, which involved a class action brought by a car renter under the UCL against a car rental corporation, the Court of Appeal noted that "[t]he *Cel-Tech* court required 'that any finding of unfairness to competitors under [Business and

Professions Code] section 17200 be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition[]' [citation]" (*Schnall, supra*, 78 Cal.App.4th at p. 1166, fn. omitted), and stated that the *Schnall* plaintiff's UCL claim, "unlike that in *Cel-Tech*, does not pertain to unfair competition between direct competitors. Nonetheless, accepting the suggestion of *Cel-Tech* that *any* claims of unfairness under the UCL should be defined in connection with a legislatively declared policy, we find such a test satisfied in this case." (*Schnall, supra*, at p. 1166.)

In *Gregory, supra*, 104 Cal.App.4th at page 854, the Court of Appeal apparently agreed with the *Schnall* court, stating that "*Cel-Tech* ... may signal a narrower interpretation of the prohibition of unfair acts or practices in *all* unfair competition actions ...." (Second italics added.) The *Gregory* court also stated that "where a claim of an unfair act or practice is predicated on public policy, we read *Cel-Tech* to require that the public policy which is a predicate to the action must be 'tethered' to specific constitutional, statutory or regulatory provisions." (*Gregory*, supra, at p. 854.)

We need not decide which test or definition of the term "unfair" applies in the instant case. We conclude that, regardless of which applies, Bernardo failed to substantiate her claim that Planned Parenthood's Web site speech constituted an "unfair" business practice or act within the meaning of the UCL. Bernardo points to no legislative policy, or to any public policy "tethered" to any specific constitutional, statutory or regulatory provision, which was allegedly offended or violated by Planned Parenthood's speech. In her reply brief, Bernardo continues to argue that she has "detailed a long list of specific *factual* representations [by Planned Parenthood] that are *false*." (Italics added.) For

reasons already discussed, we have rejected Bernardo's contention that Planned Parenthood's Web site statements concerning the claimed ABC link were "factual representations" because her own evidence shows that those statements were expressions of *opinion* regarding a disputed issue that is the subject of an ongoing scientific debate between proponents of Bernardo's view that induced abortion increases the risk of breast cancer, and proponents of Planned Parenthood's position that credible scientific evidence does not establish such a link. The court properly found that "the very fact that [Bernardo's experts] recognize and discuss the contrary opinions in their declarations shows that the issue of whether induced abortions increase the risk of breast cancer is far from being a foregone scientific conclusion."

Furthermore, the authenticated photocopies of Planned Parenthood's Web pages submitted by Bernardo show that PPFA explained to visitors of the Anti-Choice Claims Web page that there are two opposing views on the claimed ABC link. That Web page contained a review of some of the many studies of the alleged ABC link published during the past 20 years, including studies that support Bernardo's position that such a link exists, such as Brind's meta-analysis (see fn. 4, *ante*) and Daling's study published in the *Journal of the National Cancer Institute* (see fn. 5, *ante*). The Web page included a "Works Cited" bibliography that cited 32 published studies on the ABC link issue, including Brind's meta-analysis, Daling's study, and others works that supported Bernardo's position on the ABC link. In addition, the Web page explained the ABC link theory that Bernardo advocates: "The theory linking pregnancy termination and breast cancer is based on the hormonal disruption that occurs when a woman's pregnancy is interrupted. Pregnancy initiates a surge of sex hormones (estrogen, progesterone, and prolactin), which leads to differentiation of the cells in the

breast glands in preparation for lactation. ... Adherents of this theory claim that interruption of the first trimester of a first pregnancy causes a cessation of cell differentiation that may result in a subsequent increase in the risk of cancerous growth in these tissues."

The unfairness prong of Business and Professions Code section 17200 "'has been used to enjoin deceptive or sharp practices. ...' [Citation.]" (*Klein v. Earth Elements, Inc., supra*, 59 Cal.App.4th at p. 970, italics added.) Based on the foregoing evidence submitted by Bernardo regarding PPFA's statements in its Anti-Choice Claims Web page concerning the school of thought on the ABC link issue to which Bernardo subscribes and which PPFA strenuously rejects, we conclude she failed to show that PPFA engaged in "deceptive or sharp" practices that may be enjoined under the UCL, and she failed to meet her burden of showing a reasonable probability of prevailing on her claim that Planned Parenthood's Web site speech on the ABC link issue was an "unfair" practice or act within the meaning of the UCL.

iii. *"Fraudulent" business practice or act*

To establish that Planned Parenthood's speech constituted a "fraudulent" business act or practice within the meaning of Business and Professions Code section 17200, Bernardo is required to " 'show that "members of the public are likely to be deceived."' " (*Nike, supra*, 27 Cal.4th at p. 951; *Shvarts v. Budget Group, Inc., supra*, 81 Cal.App.4th at pp. 1159-1160.)

Here, Bernardo has not shown, and cannot show, that members of the public are likely to be deceived into procuring an abortion or any other service provided by Planned Parenthood or one of its affiliates based on the Web site

speech that Bernardo seeks to enjoin. Regarding the ABC link issue, PPFA's Anti-Choice Claims Web page informed visitors that there are two schools of scientific research with opposing points of view on the issue of whether an induced abortion increases the risk of breast cancer. That Web page discussed Bernardo's point of view as well as Planned Parenthood's position and provided citations to all published studies and articles referenced therein, including those that supported Bernardo's position, thereby providing all interested visitors the means to independently view both sides of the controversy for themselves. Although Bernardo claims that Planned Parenthood's statements comparing mortality rates of abortion and childbirth were false and misleading because they did not factor in deaths resulting from the abrogation of the "protective effect" caused by termination of pregnancy via induced abortion and resulting in breast cancer deaths, Bernardo's own evidence shows that PPFA expressly acknowledged in its Anti-Choice Claims Web page that "[i]t is known that having a full-term pregnancy early in a woman's childbearing years is *protective against breast cancer*" (italics added); PPFA stated in its Choosing Abortion Web page that "abortion does not offer the same *protection against breast cancer* as a full term pregnancy" (italics added); and PPSDRC stated in its Abortion Info Web page that "abortion does not offer the *protection against breast cancer* that having several full-term pregnancies does" (italics added). We conclude that Bernardo failed to meet her burden of showing a reasonable probability of prevailing on the merits of her claims that Planned Parenthood's speech was likely to deceive members of the public and that it constituted a fraudulent business act or practice within the meaning of the UCL.

b. *FAL*

"California's false advertising law ([Bus. & Prof. Code,] § 17500 et seq.) makes it 'unlawful for any person, ... corporation ..., or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services ... or to induce the public to enter into any obligation relating thereto, to make or disseminate ... before the public in this state, ... in any newspaper or other publication ... or in any other manner or means whatever ... any statement, concerning that real or personal property or those services ... which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading ....' ([Bus. & Prof. Code,] § 17500.)" (*Nike, supra*, 27 Cal.4th at p. 950.)

The *Nike* court explained that "to state a claim under either the UCL or the false advertising law, based on false advertising or promotional practices, 'it is necessary only to show that "members of the public are likely to be deceived."' [Citations.]" (*Nike, supra*, 27 Cal.4th at p. 951.)

We have already concluded that Bernardo failed to show a reasonable probability of prevailing on the merits of her claims that Planned Parenthood's challenged Web site speech is commercial or that its statements concerning the claimed ABC link and the safety of abortion are false, misleading or deceptive representations of fact that are actionable under Business and Professions Code sections 17200 and 17500. **(8)** Were we to assume that Planned Parenthood's speech could properly be characterized as advertising actionable under Business and Professions Code section 17500, we would conclude that Bernardo failed to show a reasonable probability of prevailing on the merits of her FAL claim because for reasons discussed, *ante*, her own evidence established she

failed to meet her burden of showing a reasonable probability of prevailing on the merits of her claim that Planned Parenthood's speech was likely to deceive members of the public.

3. *Claim that the court improperly evaluated Bernardo's evidence*

Bernardo contends the court "engaged in an improper evaluation of [her] prima facie showing by repeatedly weighing the credibility of her experts and the comparative probative strength of competing evidence when addressing [her] claims." Bernardo also complains the court "repeatedly viewed evidence in the light least favorable to [her] claims," "rejected [her] evidence by characterizing [Planned Parenthood's] statements as education, not advertising or statements made in connection with an offer of services, and as no more than statements of opinion." Bernardo maintains that the court's "improper evaluation" of her prima facie showing produced erroneous legal conclusions, such as the court's conclusion that Planned Parenthood's Web site statements were not unlawful, unfair, or fraudulent.

Bernardo's contentions are moot. As already discussed, we independently review the order granting Planned Parenthood's motion to strike the complaint under the anti-SLAPP statute under a de novo standard of review (*Kajima Engineering & Construction, Inc. v. City of Los Angeles, supra*, 95 Cal.App.4th at p. 929). We thus independently decide whether the granting of that motion was correct, but we need not decide whether the court's reasoning in granting that motion was proper.

For reasons already discussed, we have concluded that Bernardo's own evidence in opposition to Planned

Parenthood's anti-SLAPP motion to strike shows that she did not, and could not, state and substantiate a legally sufficient claim under either the UCL or FAL, and thus she failed to demonstrate a probability of prevailing as required by section 425.16(b)(1) and case law interpreting that subdivision. (See *Navellier, supra*, 29 Cal.4th at p. 88.) Accordingly, we need not, and do not, address the specifics of Bernardo's contention that the court improperly evaluated her prima facie showing.

4. *Claim that application of section 425.16 violated Bernardo's constitutional rights*

Last, Bernardo contends that "if the [court's] application of [section 425.16] is correct, then the statute violates [her] First Amendment and Due Process rights." Bernardo apparently maintains that the court's granting of Planned Parenthood's motion to strike her complaint under the anti-SLAPP statute violated her First Amendment right to petition the government for redress of grievances by filing her lawsuit under the UCL and FAL. Bernardo also asserts that due process is a "concept which voids laws that are vague or overbroad as well as those that deprive citizens of their rights without adequate notice," and complains that the court "employed a standard that could never be predicted in advance--one that essentially required [her] to predict with certainty the way in which the Court would view her evidence and the way in which the Court would resolve questions of fact and law." Specifically, she maintains that *section 425.16* violates her due process rights because "the 'reasonable probability of success on the merits' standard is meaningless in practice," and she complains that she "has been barred from the courts of [California] based on a standard that, if properly applied in this case, bars all litigants but those that can predict the future."

We reject Bernardo's contention that application of the anti-SLAPP statute violated her First Amendment rights. The California Supreme Court has explained that "'[t]he right to petition is not absolute, providing little or no protection for baseless litigation' [citation]." (*Equilon, supra*, 29 Cal.4th at p. 64.) Here, Bernardo does not dispute that Planned Parenthood met its threshold burden under section 425.16(b)(1) of showing that Bernardo's claims against Planned Parenthood for injunctive relief under the UCL and FAL arose from protected activity. The court properly took judicial notice of the fact that abortion is one of the most controversial political issues in our nation. Because Bernardo's complaint challenged Planned Parenthood's Web site speech concerning the claimed ABC link and the risks involved in abortion procedures, as Planned Parenthood argued in its motion papers, Planned Parenthood met its burden of showing that Bernardo's suit arose from "written ... statement[s] ... made in a place open to the public or a public forum in connection with an issue of public interest" within the meaning of section 425.16, subdivision (e)(3) discussed, *ante*. For reasons already discussed, Bernardo failed to meet her burden under section 425.16(b)(1) of stating and substantiating a legally sufficient claim (see *Navellier, supra*, 29 Cal.4th at pp. 88-89). By properly finding that Bernardo's lawsuit was a SLAPP and dismissing it under section 425.16, the court did not interfere with her First Amendment free speech or petitioning rights. The California Supreme Court has explained that the anti-SLAPP statute "subjects to potential dismissal only those causes of action as to which the plaintiff is unable to show a probability of prevailing on the merits (§ 425.16, subd. (b)), a provision we have read as 'requiring the court to determine only if the plaintiff has stated and substantiated a legally sufficient claim' [citation]. So construed, 'section 425.16 provides an efficient means of dispatching, early on in a lawsuit, [and discouraging, insofar

as fees may be shifted,] a plaintiff's *meritless* claims.' [Citation.]" (*Equilon, supra*, 29 Cal.4th at p. 63, italics added.) The anti-SLAPP statute did not prevent Bernardo from bringing a meritorious claim; it properly prevented her from continuing to prosecute her meritless SLAPP suit. The application of section 425.16 in this matter did not violate Bernardo's First Amendment rights.

We also reject Bernardo's contention that the "reasonable probability of success on the merits" standard under section 425.16 is both meaningless and a violation of her right to due process. As already discussed, the California Supreme Court has explained that in order to establish the requisite probability of prevailing required by section 425.16(b)(1),[16] a plaintiff "need only have '"stated and substantiated a legally sufficient claim."' [Citation.] 'Put another way, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."' [Citation.]" (*Navellier, supra*, 29 Cal.4th at pp. 88-89.) This standard is sufficient for due process purposes to put a plaintiff like Bernardo on adequate notice as to the burden that must be met under section 425.16(b)(1) to defeat a motion to strike brought under the anti-SLAPP statute.

In sum, the gravamen of Bernardo's action against Planned Parenthood was (1) her unsubstantiated assertion that the ABC link is an established scientific fact, and (2) her unsubstantiated claim that Planned Parenthood published on its Web sites commercial speech consisting of false and

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[16] The text of section 425.16(b)(1) is set forth in footnote 11, *ante*.

misleading statements of fact about the safety of abortion, the safety of abortion vis- [agrave] -vis childbirth, and the scientific and medical literature that Bernardo believes has established the existence of the ABC link that should be enjoined under the UCL and FAL and replaced by speech to be published on Planned Parenthood's own Web sites, pursuant to a mandatory injunction, that would have expressed her view that the claimed ABC link is an established scientific fact.

We hold that the dismissal of Bernardo's action under the anti-SLAPP statute was proper on the ground she failed to meet her statutory burden under section 425.16 of showing a reasonable probability of prevailing on the merits of her claims for injunctive relief because (1) her own evidence demonstrated that Planned Parenthood's statements about the claimed ABC link were noncommercial expressions of opinion about an issue of genuine scientific debate that were fully protected under the First Amendment and thus not actionable under either the UCL or FAL; (2) her challenge to Planned Parenthood's statements regarding the safety of abortion failed as a matter of law because this challenge was based on the unsubstantiated premise that the claimed ABC link is an established scientific fact; and (3) she failed to show a reasonable probability of prevailing on the merits of her claims that Planned Parenthood's speech, assuming it consisted of commercial statements of fact, was unlawful, unfair or fraudulent within the meaning of the UCL or constituted false advertising within the meaning of the FAL. We also hold that the dismissal of her action under the anti-SLAPP statute did not violate her First Amendment or due process rights.

Because the claimed link between abortion and breast cancer is a public health issue about which scientific

researchers and public health advocates in good faith have disagreed, the proper resolution of this appeal requires application of the fundamental public-speech principle enunciated by the United States Supreme Court that "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an *opinion* may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 339-340, italics added, fn. omitted.) Here, Planned Parenthood's Web site speech interpreting, evaluating and discussing the content and weight of the scientific literature addressing the claimed ABC link represents the kind of rigorous debate on issues of public concern that the First Amendment was designed to promote and protect.

II.

BERNARDO'S APPEAL FROM THE MANDATORY ATTORNEY FEES AWARD UNDER SECTION 425.16(c)

Bernardo separately appeals the court's order awarding attorney fees to Planned Parenthood in the amount of $77,835.25 under the mandatory fees provision set forth in section 425.16(c).[17] Bernardo contends that section 425.16(c) is unconstitutional on its face and as applied, asserting the attorney fees award levied against her is a penalty that violates

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[17] Section 425.16(c) provides: "In any action subject to subdivision (b), *a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs*. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to *Section 128.5*." (Italics added.)

her constitutional right to (1) petition the government for redress of grievances and access the courts by filing litigation; (2) due process; and (3) equal protection. We reject these contentions.

A. *Standard of Review*

"The interpretation of a statute and the determination of its constitutionality are questions of law. In such cases, appellate courts apply a de novo standard of review. [Citation.]" (*People v. Health Laboratories of North America, Inc.* (2001) 87 Cal.App.4th 442, 445 (*Health Laboratories*).)

B. *Analysis*

1. *First Amendment and right to petition*

Claiming that the mandatory award of attorney fees levied against her under section 425.16(c) is a "fine" and a "draconian penalty," and asserting that "[t]he State of California cannot penalize litigants for bringing suits regarded as unlikely to succeed," Bernardo contends that section 425.16 violates her First Amendment rights to petition and access the courts because it imposes a penalty and "liability for fees" without requiring a showing that the suit is objectively frivolous. In support of this contention, Bernardo cites several United States Supreme Court and California Supreme Court decisions for the proposition that, as a general First Amendment principle, the law cannot impose penalties or tort liability for filing a lawsuit absent a showing that the suit is objectively groundless.[18]

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[18] Bernardo cites, for example, *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.* (1993) 508 U.S.

Bernardo's arguments are based on the unsupported premise that the anti-SLAPP statute's fee shifting provisions "penalize" or impose "liability" on plaintiffs whose complaints are dismissed under section 425.16. In *Equilon, supra*, 29 Cal.4th 53, the California Supreme Court held that a defendant moving to strike a cause of action under section 425.16 on the ground it is a SLAPP need not show that the plaintiff brought the action with the subjective intent of chilling the defendant's exercise of constitutionally protected speech or petitioning activity. (*Equilon, supra*, 29 Cal.4th at pp. 57, 68.) In arguing that an intent-to-chill proof requirement was a constitutionally compelled element of the anti-SLAPP statutory scheme, the plaintiff in *Equilon* asserted that the *First Amendment* generally bars "liability" for filing lawsuits that are not "shams." (*Equilon, supra, at p. 62.*) Noting that "[h]undreds of California statutes provide for an award of attorney fees to the prevailing party [citations]" (*Equilon, supra*, 29 Cal.4th at p. 62), the *Equilon* court rejected that argument and stated that fee shifting under section 425.16(c) "does not make a party 'liable' for filing a lawsuit, but rather simply requires the party that creates the costs to bear them." (*Equilon, supra*, at p. 62.) The high court also rejected the argument that the anti-SLAPP statute's fee-shifting provisions unconstitutionally "punish" plaintiffs, explaining that "[p]laintiffs as well as defendants may recover fees: defendants ... only when the plaintiff burdens free speech with an unsubstantiated claim [citation]; plaintiffs whenever a defendant's motion to strike is 'frivolous or is

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49, 60-61; *Bill Johnson's Restaurants, Inc. v. NLRB* (1983) 461 U.S. 731, 741; *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 Cal.3d 1157, 1169; and *Pacific Gas and Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118.

solely intended to cause unnecessary delay' (§ 425.16(c))." (*Equilon, supra*, 29 Cal.4th at p. 63.)

The Supreme Court's reasoning in *Equilon* is equally applicable here. By providing for a mandatory award of attorney fees in favor of a defendant who prevails on a motion to strike under the anti-SLAPP statute, section 425.16(c) does not punish, penalize, or impose "liability" on the SLAPP plaintiff. The fee shifting simply requires the plaintiff, as the party whose SLAPP suit caused the defendant to incur attorney fees and other costs, to bear those fees and costs. (*Equilon, supra*, 29 Cal.4th at p. 62.) In this regard, Bernardo correctly acknowledges in her appellant's opening brief that the fee award under section 425.16(c) "is designed to *compensate* defendants for the cost of defending the suit ...." (Italics added.)

Our conclusion that the court's award of attorney fees in favor of Planned Parenthood under section 425.16(c) did not violate Bernardo's constitutional right to petition the government for redress of grievances is also compelled by this court's decision in *Schroeder v. Irvine City Council (2002)* 97 Cal.App.4th 174 (*Schroeder*). In *Schroeder*, the plaintiff, a taxpayer, sued a city, its city council and several city council members, seeking injunctive relief and a declaration that the city's program to increase voter registration was an illegal expenditure of public funds. (*Id.* at p. 179.) The defendants moved to dismiss the action under the anti-SLAPP statute. The trial court granted the motion, finding that the plaintiff had failed to show a reasonable probability of success on the merits, and awarded attorney fees to the defendants as the prevailing parties under section 425.16(c). (*Schroeder, supra*, 97 Cal.App.4th at p. 179.) On appeal, the plaintiff challenged the dismissal of the lawsuit and also challenged the attorney fee award on the grounds that a mandatory attorney

fee award against a taxpayer who has challenged a governmental program would unconstitutionally infringe upon his or her right to petition the government for redress of grievances. (*Id.* at p. 193.) We rejected the plaintiff's constitutional challenge to the fee award, and held that "[t]he right to petition for redress of grievances includes the right to sue [citation] private as well as governmental entities. [Citation.] However, 'the right to petition has never been absolute' [citation] and 'baseless litigation is not immunized by the First Amendment right to petition.' [Citation.] ... [C]onstitutional rights to petition have been subjected to reasonable restrictions to prevent abuse of the right, and narrowly drawn restrictions on that right can be valid. " (*Schroeder, supra*, at p. 195.)

In *Schroeder*, we recognized that "the government is injured by meritless suits, that the right to petition does not provide an absolute immunity to citizens who bring meritless suits, and the Legislature may by statute grant governments the ability to recoup their attorney fees.... [T]he right to petition may be subject to legislatively imposed conditions and restrictions, provided the restrictions are narrowly drawn to achieve a substantial governmental interest that is content neutral and unrelated to the suppression of the exercise of First Amendment rights. ... [T]he Legislature may provide for an award of attorney fees to governmental entities for defending against frivolous lawsuits without impermissibly infringing on the right of petition for redress of grievances." (*Schroeder, supra*, 97 Cal.App.4th at p. 196.) We concluded that the mandatory attorney fee provision set forth in section 425.16(c) "is valid because it seeks to achieve a substantial governmental interest that is content neutral and unrelated to the suppression of the exercise of First Amendment rights and is narrowly tailored to achieve that interest. There is a substantial governmental interest in deterring unmeritorious

lawsuits generally, and that interest assumes greater weight in the arena governed by section 425.16[(c)]: unmeritorious lawsuits that can chill the defendant's exercise of First Amendment rights. Although [plaintiff] argues that the statute is designed to suppress protected activity--his right to sue the government--we conclude the statute is primarily designed to *promote and encourage* protected conduct--the right of defendants to exercise their First Amendment rights without fear of unmeritorious SLAPP lawsuits." (*Schroeder, supra*, 97 Cal.App.4th at p. 196, original italics.) We further held that the attorney fee clause of section 425.16 passes constitutional muster because it "applies to all unmeritorious lawsuits premised on acts taken in furtherance of the defendant's constitutional rights of petition or free speech, regardless of the point of view espoused by the plaintiff. It applies only to that narrow category of lawsuits ... that are premised on acts taken in furtherance of the defendant's rights of speech, and leaves untouched any other type of lawsuit. ... Finally, it is closely tailored to achieve these substantial governmental interests because it has no application to most lawsuits ... but instead applies only to lawsuits in which two narrow conditions are satisfied: first, the court must be satisfied that the lawsuit seeks recovery for acts taken in furtherance of the defendant's rights of free speech or petition; and second, the lawsuit must be so lacking in merit that, even when the evidence is viewed most favorably to the plaintiff, the plaintiff cannot prevail as a matter of law." (*Schroeder, supra*, at p. 197.)

2. *Due Process*

Bernardo also claims that section 425.16(c) violated her due process rights in two ways. First, she repeats her contentions that "the 'reasonable probability of success on the merits' language is unconstitutionally vague," this standard is

"meaningless in practice," and "[t]he net result of the standard imposed by [section 425.16] is to require [her] to predict the inherently unpredictable under pain of *penalty* in the form of attorney fees." (Italics added.) For the reasons discussed, *ante*, we have already concluded that the "reasonable probability of success on the merits" standard codified in section 425.16(b)(1) (see fn. 11, *ante*), as interpreted by the California Supreme Court (see *Navellier, supra*, 29 Cal.4th at pp. 88-89), is not unconstitutionally vague and thus the court's application of that standard in this matter did not violate Bernardo's right to due process. As already discussed, the Supreme Court has held that the section 425.16(c) fee-shifting provision that Bernardo challenges here does not unconstitutionally "punish" plaintiffs whose SLAPP causes of action are subject to dismissal for failure to show a probability of prevailing on the merits. (*Equilon, supra*, 29 Cal.4th at p. 63.) The fee shifting under section 425.16(c) "simply requires the party that creates the costs to bear them." (*Equilon, supra*, 29 Cal.4th at p. 62.)

Second, Bernardo contends the mandatory fee shifting provision of section 425.16(c) violates due process because it does not require a showing of fault, such as a reckless disregard for the truth, supported by a heightened evidentiary standard, such as clear and convincing evidence, that she claims is required to impose "damages," "liability," a "fine," or a "draconian penalty" in the form of a fee award for activity that involves the exercise of fundamental First Amendment rights, such as the right to pursue litigation. As already discussed, however, the California Supreme Court has held that "'[t]he right to petition is not absolute, providing little or no protection for baseless litigation' [citation]." (*Equilon, supra*, 29 Cal.4th at p. 64.) Bernardo's contention is based on the unsupported premise that she had a fundamental First Amendment right to bring a SLAPP against

Planned Parenthood. Bernardo has cited no authority, and we are aware of none, that supports her implied assumption that a litigant has a fundamental constitutionally-protected right to file a SLAPP suit.

3. *Equal Protection*

Last, Bernardo contends that the mandatory fee shifting provision of section 425.16(c) violates her right to equal protection of laws because it "creates an unconstitutional penalty" and imposes fee liability for "the exercise of First Amendment rights that discriminates between parties based on the nature of their First Amendment activity and the nature of the plaintiff." Specifically, Bernardo maintains that (1) the "statutory language and purpose" indicate that section 425.16(c) and its attorney fees provision are designed to "favor a defendant's First Amendment rights to speech over a plaintiff's First Amendment right to petition and access courts"; and (2) section 425.16, subdivision (d) (hereafter § 425.16(d), discussed, *post*) "creates impermissible classifications based upon the identity of the plaintiff as either a public or private attorney general." We reject these contentions.

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike. [Citation.]" (*Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 439.)

"Although most statutes differentiate somehow between classes of people, the equal protection clause does not forbid classifications. [Citation.] So long as the classification is not arbitrary but is based on some difference in the classes having

a substantial relation to a legitimate object to be accomplished, Legislatures may make reasonable classifications of persons, businesses and activities. [Citation.] [¶] The equal protection clause of the California Constitution similarly states that a person 'may not be denied equal protection of laws' (Cal. Const., art. I, § 7), and statutory classifications challenged thereunder are analyzed by the same rules applicable to challenges to the Fourteenth Amendment. [Citations.]" (*Health Laboratories, supra*, 87 Cal.App.4th at pp. 447-448.)

The *Health Laboratories* court further explained that "[l]egislative classifications are presumed valid and will be sustained if the classification is rationally related to a legitimate state interest. Most statutes challenged on equal protection grounds are tested by this rational basis standard. [Citation.] Only when the classification jeopardizes the exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic is the statute subject to the heightened review employed in strict scrutiny test. [Citation.] To pass constitutional muster in that case, such statutes must be suitably tailored to serve a compelling state interest. [Citation.] For purposes of the strict scrutiny test, a fundamental right means a fundamental constitutional right. [Citation.]" (*Health Laboratories, supra*, 87 Cal.App.4th at p. 448.)

As already discussed, the California Supreme Court has held that the mandatory section 425.16(c) fee-shifting provision does not unconstitutionally "punish" or impose "liability" on plaintiffs whose SLAPP causes of action are subject to dismissal for failure to show a probability of prevailing on the merits. (*Equilon, supra*, 29 Cal.4th at p. 63.)

Bernardo complains that section 425.16(c) "provides differing liability for fees based upon the nature of petitioning activity" because under that subdivision a plaintiff is liable for mandatory fees without any showing of fault if the defendant prevails, but a defendant is liable for fees only upon a showing that the defendant's motion to strike is frivolous or solely intended to cause delay. Bernardo asserts that the court's award of attorney fees in favor of Planned Parenthood in this matter violated her right to equal protection because the result of the application of the section 425.16(c) mandatory fee provision is "to punish the plaintiff's exercise of the fundamental right to petition the courts by creating a cost not born[e] by opponents in litigation," and "the statute, in effect, makes the courts available to different parties, on different terms, depending upon the nature of their petitioning activity."

These assertions are unavailing. There is no fundamental First Amendment right to petition the courts by filing a SLAPP. As already discussed, the California Supreme Court has explained that "'[t]he right to petition is not absolute, providing little or no protection for baseless litigation' [citation]." (*Equilon, supra*, 29 Cal.4th at p. 64.) Furthermore, the mandatory fee shifting provision of section 425.16(c) does not bar Bernardo or any other plaintiff from bringing a meritorious claim. Contrary to Bernardo's assertion, section 425.16(c) does not make the courts "available to different parties, on different terms, depending upon the nature of their petitioning activity."

We also reject Bernardo's contention that the anti-SLAPP statute unconstitutionally discriminates against her by refusing her the "immunity" accorded to public prosecutors under section 425.16(d), which provides: "This section shall not apply to any enforcement action brought in the name of the

people of the State of California by the Attorney General, district attorney, or city attorney, acting as a *public prosecutor*." (Italics added.)

Bernardo claims that she brought this action for injunctive relief against Planned Parenthood on behalf of the public, without seeking any personal gain, and the effect of section 425.16(d) "is to create a discrimination against private parties advancing the public interest that is inimical" to her constitutionally protected right to equal protection of the law.

This claim is unavailing. In *Health Laboratories, supra*, 87 Cal.App.4th at page 451, the Court of Appeal held that the provision of the anti-SLAPP statute exempting public prosecutors from its strictures does not violate the equal protection clauses (U.S. Const., 14th Amend., § 1; Cal. Const., art. I, § 7). The *Health Laboratories* court noted that "SLAPP suits are typically characterized as suits brought not to vindicate a legal right but to interfere with the defendant's ability to pursue his or her interest. [Citation.] SLAPP plaintiffs do not care so much about winning their lawsuits as they care about delaying and distracting the defendant from his or her objective, which is generally economically adverse to those of the SLAPP plaintiff. SLAPP plaintiffs achieve their goal if their suits deplete the defendant's resources and energy. [Citations.] The legislative history of section 425.16 plainly implies that its purpose was to prevent the harm caused by such plaintiffs." (*Health Laboratories, supra*, 87 Cal.App.4th at p. 450.)

The *Health Laboratories* court also noted that, "[b]y contrast, a public prosecutor's enforcement action is not motivated by a retaliatory attempt to gain a personal advantage over a defendant .... *The prosecutor's motive derives from the constitutional mandate to assure that the laws*

of the state are uniformly enforced and to prosecute any violation of these laws, so that order is preserved and the public interest protected. [Citations.]" (*Health Laboratories, supra*, 87 Cal.App.4th at p. 450, italics added.) The court explained that "[n]othing in the legislative history of section 425.16 implies that the problem the Legislature sought to rectify thereby was created by prosecutors bringing meritless enforcement actions. The state may properly limit a regulation to the class of persons as to whom it thinks the need for regulation is more crucial or imperative. [Citation.] [¶] To enable prosecutors to perform their constitutional duties thoroughly and effectively, laws have been enacted to insulate them from actions that would hinder or deter their enforcement actions. ... [¶] The exclusion of public prosecutors from the anti-SLAPP motion procedure is consistent with the rationale of these immunity statutes. Subjecting them to such a procedure could unduly hinder and undermine their efforts to protect the health and safety of the citizenry at large by delaying an enforcement action. Not only would prosecutors have to respond to the motion at the trial level, they could become ensnared in an appeal, insofar as the grant or denial of a SLAPP motion is immediately appealable. (§ 425.16, subd. (j).) False advertising enforcement actions could be particularly susceptible to delay by the moving manufacturer's easy assertion that the prosecutor's action interfered with its commercial free speech rights." (*Health Laboratories, supra*, 87 Cal.App.4th at pp. 450-451.)

A *private* plaintiff bringing suit under the UCL or FAL allegedly on behalf of the public is not similarly situated to a public prosecutor because the private litigant's motive, unlike that of a public prosecutor, does not derive "from the constitutional mandate to assure that the laws of the state are uniformly enforced and to prosecute any violation of these laws, so that order is preserved and the public interest

protected" (*Health Laboratories, supra*, 87 Cal.App.4th at p. 450). We conclude that the classification created by section 425.16(d)'s exemption of public prosecutors' enforcement actions from anti-SLAPP motions does not jeopardize the exercise of a fundamental right or categorize litigants on the basis of an inherently suspect characteristic; it is rationally related to the state's legitimate interest in allowing public prosecutors who did not create the SLAPP problem to pursue actions to enforce laws, unencumbered by delay, intimidation, or distraction; and thus it does not violate the equal protection clause of either the United States or California Constitution.

DISPOSITION

The orders are affirmed. Planned Parenthood shall recover its costs and attorney fees on appeal. (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 785; *Dowling, supra*, 85 Cal.App.4th at p. 1434.) The cause is remanded to the trial court for a determination of the amount of reasonable attorney fees and costs Planned Parenthood shall recover from Bernardo under the provisions of section 425.16(c).

McIntyre, J., and O'Rourke, J., concurred.

APPENDIX C

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

CASE NO. 772552

[Filed July 19, 2002]

AGNES BERNARDO, PAMELA COLIP, and SAUNDRA DUFFY HAWKINS, individually and on behalf of the GENERAL PUBLIC, Plaintiffs,	)
v.	)
PLANNED PARENTHOOD FEDERATION OF AMERICA and PLANNED PARENTHOOD OF SAN DIEGO AND RIVERSIDE COUNTIES, Defendants.	)

ORDER

JUDGE: Ronald S. Prager

The Defendant's MOTION TO STRIKE under Code of Civil Procedure Section 425.16 in the above entitled matter came on regularly for hearing by the Honorable Judge Ronald

S. Prager on March 18, 2002, at the Superior Court of the State of California for the County of San Diego. Having considered arguments on March 18, 2002, the Honorable Judge Ronald S. Prager renders the following decision:

As to the MOTION TO STRIKE under Code of Civil Procedure Section 425.16 (Strategic Lawsuits Against Public Participation or "SLAPP") filed by Defendants PLANNED PARENTHOOD FEDERATION FO AMERICA and PLANNED PARENTHOOD OF SAN DIEGO and RIVERSIDE COUNTIES against the complaint of Plaintiffs AGNES BERNARDO, PAMELA COLIP, and SAUNDRA DUFFY HAWKINS, individually and on behalf of the GENERAL PUBLIC, the Court grants the MOTION TO STRIKE and, consequently, dismisses the complaint with prejudice.

The Defendant's MOTION FOR ATTORNEYS FEES under Code of Civil Procedure Section 425.16 in the above entitled matter came on regularly for hearing by the Honorable Judge Ronald S. Prager on June 14, 2002, at the Superior Court of the State of California the County of San Diego. Having considered arguments on June 14, 2002, the Honorable Judge Ronald S. Prager renders the following decision:

As to the MOTION FOR ATTORNEYS FEES under Code of Civil Procedure Section 425.16 filed by Defendants PLANNED PARENTHOOD FEDERATION OF AMERICA and PLANNED PARENTHOOD OF SAN DIEGO and RIVERSIDE COUNTIES against Plaintiffs AGNES BERNARDO, PAMELA COLIP, and SAUNDRA DUFFY HAWKINS, individually and on behalf of the GENERAL PUBLIC, the Court grants the MOTION FOR ATTORNEYS FEES.

IT IS HEREBY ORDERED, adjudged and decreed that Defendants have judgment in their favor and be accorded the following:

(1) Defendants' attorneys fees incurred prior to the Court's order granting the Defendant's MOTION TO STRIKE on March 18, 2002, calculated by the lodestar adjustment method in the amount of $42,528.14; multiplied by 1.75 as adequate compensation for the contingent nature of the fee award; for a sum of attorneys fees to Defendants in the amount of $74,424.25.

(2) Defendant's attorneys fees incurred subsequent to the Court's order granting the Defendant's MOTION TO STRIKE on March 18, 2002, calculated by the lodestar adjustment method in the amount of $3,411.00; for a sum of attorneys fees to Defendants in the amount of $3,411.00.

(3) TOTAL SUM of attorneys fees to Defendants in the amount of $77,835.25.

July 19, 2002
DATE

/s/
JUDGE OF THE SUPERIOR COURT
RONALD S. PRAGER

JAMES E. McELROY, State Bar No. 079313
LAW OFFICES OF JAMES E. McELROY
625 Broadway, Suite 1400
San Diego, CA 92101

(619) 232-6686

Attorney for DEFENDANTS

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

CASE NO. 772552

AGNES BERNARDO, PAMELA COLIP, and SAUNDRA DUFFY HAWKINS, individually and on behalf of the GENERAL PUBLIC, Plaintiffs,	)
v.	)
PLANNED PARENTHOOD FEDERATION OF AMERICA and PLANNED PARENTHOOD OF SAN DIEGO AND RIVERSIDE COUNTIES, Defendants.	)

NOTICE OF ENTRY OF JUDGMENT
[CCP § 664.5]

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD

NOTICE IS HEREBY GIVEN THAT judgment was entered in this action on July 19, 2002, as set forth in the signed Order attached hereto Exhibit A.

DATED: 11/4/02 LAW OFFICES OF JAMES E. McELROY

By: /s/
JAMES E. McELROY
Attorney for Defendants

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

Title of Case
BERNARDO v. PLANNED PARENTHOOD

JAMES E. McELROY (619) 232-6686
LAW OFFICES OF JAMES E. McELROY, APC
625 Broadway, Suite 1400
San Diego, CA 92101

Attorney for Defendants Hearing date/time/dept.

Case No. GIC 772552

DECLARATION OF SERVICE

I, STEPHANIE SESE, declare that: I am over the age of eighteen years and not a party to the action; I am employed in the County of San Diego, California and my business address is 625 Broadway, Suite 1400, San Diego, CA 92101. I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service pursuant to which practice the correspondence will be deposited with the United States Postal Service this same day in the ordinary course of business.

On November 4, 2002 I served the following documents(s):

NOTICE OF ENTRY OF JUDGMENT (dated 11/4/02)
ORDER (dated 7/19/02)

on the parties as follows:

STUART E. FAGAN, ESQ., FAGAN & FAGAN, 3110 Camino Del Rio South, Suite 203 San Diego, CA 92108 Fax: (619) 528-9675

THOMAS MORE LAW CENTER, PATRICK T. GILLEN, JOHN KINDLEY, 3475 Plymouth Road, Suite 100, Ann Arbor, Michigan 48105 Fax: (734) 998-4778

_____ (BY FACSIMILE) By faxing a copy thereof.

XX (BY MAIL) By placing a copy thereof in a separate, sealed envelope for each addressee and with the postage thereon fully prepaid, either deposited each in the United States Postal Service or placed each for collection and mailing at San Diego, California, following ordinary business practices.

_____ (PERSONAL SERVICE) By leaving a copy thereof with the above named person or an officer or agent of the person.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 4, 2002

/s/
STEPHANIE SESE

APPENDIX D

SUPERIOR COURT OF THE STATE OF CALIFORNIA
INAND FOR THE COUNTY OF SAN DIEGO

CASE NO 772552

[Filed July 19, 2002]

AGNES BERNARDO, PAMELA COLIP, and SAUNDRA DUFFY HAWKINS, individually and on behalf of the GENERAL PUBLI C, Plaintiffs,	)
v.	)
PLANNED PARENTHOOD FEDERATION OF AMERICA and PLANNED PARENTHOOD OF SAN DIEGO AND RIVERSIDE COUNTIES, Defendants.	)

ORDER

JUDGE: RONALD S. PRAGER

The Defendant's MOTION TO STRIKE under Code of Civil Procedure Section 425.16 in the above entitled matter

came on regularly for hearing by the Honorable Judge Ronald S. Prager on March 18, 2002, at the Superior Court of the State of California for the County of San Diego. Having considered arguments on March 18, 2002, the Honorable Judge Ronald S. Prager renders the following decision:

As to the MOTION TO STRIKE under Code of Civil Procedure Section 425.16 (Strategic Lawsuits Against Public Participation or "SLAPP") filed by Defendants PLANNED PARENTHOOD FEDERATION FO AMERICAN and PLANNED PARENTHOOD OF SAN DIEGO and RIVERSIDE COUNTIES against the complaint of Plaintiffs AGNES BERNARDO, PAMELA COLIP, AND SAUNDRA DUFFY HAWKINS, individually and on behalf of the GENERAL PUBLIC, the Court grants the MOTION TO STRIKE and, consequently, dismisses the complaint with prejudice.

The Defendant's MOTION FOR ATTORNEYS FEES under Code of Civil Procedure Section 425.16 in the above entitled matter came on regularly for hearing by the Honorable Judge Ronald S. Prager on June 14, 2002, at the Superior Court of the State of California for the County of San Diego. Having considered arguments on June 14, 2002, the Honorable Judge Ronald S. Prager renders the following decision:

As to the MOTION FOR ATTORNEYS FEES under Code of Civil Procedure Section 425.16 filed by Defendants PLANNED PARENTHOOD FEDERATION OF AMERICA and PLANNED PARENTHOOD OF SAN DIEGO and RIVERSIDE COUNTIES against Plaintiffs AGNES BERNARDO, PAMELA COLIP, and SAUNDRA DUFFY HAWKINS, individually and on behalf of the GENERAL

PUBLIC, the Court grants the MOTION FOR ATTORNEYS FEES.

IT IS HEREBY ORDERED; adjudged and decreed that Defendants have judgment in their favor and be accorded the following:

(1) Defendants' attorneys fees incurred prior to the Court' s order granting the Defendant' s MOTION TO STRIKE on March 18, 2002, calculated by the lodestar adjustment method in the amount of $42,528.14; multiplied by 1.75 as adequate compensation for the contingent nature of the fee award; for a sum of attorneys fees to Defendants in the amount of $74,424.25.

(2) Defendant's attorneys fees incurred subsequent to the court's order granting the Defendant's MOTION TO STRIKE on March 18, 2002, calculated by the lodestar adjustment method in the amount of $3,411. O0; for a sum of attorneys fees to Defendants in the amount of $3,411.00.

(3) TOTAL SUM of attorneys fees to Defendants in the amount of $77,835.25.

July 19, 2002
DATE

RONALD S. PRAGER
JUDGE OF THE SUPERIOR COURT

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

Title of Case
BERNARDO v. PLANNED PARENTHOOD

JAMES E. McELROY (619) 232-6686
LAW OFFICES OF JAMES E. McELROY, APC
625 Broadway, Suite 1400
San Diego, CA 92101

Attorney for Defendants Hearing date/time/dept.

Case No. GIC 772552

DECLARATION OF SERVICE

I, JUDITH MADSON, declare that: I am over the age of eighteen years and not a party to the action; I am employed in the County of San Diego, California and my business address is 625 Broadway, Suite 1400, San Diego CA 92101. I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service pursuant to which practice the correspondence will be deposited with the United States Postal Service this same day in the ordinary course of business.

On July 25, 2002 I served the following documents(s):

ORDER (dated July 19,2002)

on the parties as follows:

STUART E. FAGAN, ESQ., FAGAN & FAGAN, 3110 Camino Del Rio South, Suite 202 San Diego, CA 92108 Fax: (619) 528-9675

THOMAS MORE LAW CENTER, PATRICK T. GILLEN, JOHN KINDLEY, 3475 Plymouth Road, Suite 100, Ann Arbor, Michigan 48105 Fax: (734) 998-4778

_____ (BY FACSIMILE) By faxing a copy thereof.

__XX__ (BY MAIL) By placing a copy thereof in a separate, sealed envelope for each addressee and with the postage thereon fully prepaid, either deposited each in the United States Postal Service or placed each for collection and mailing at San Diego, California, following ordinary business practices.

_____ (PERSONAL SERVICE) By leaving a copy thereof with the above named person or an officer or agent of the person.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 25, 2002

/s/_____
JUDITH MADSON

APPENDIX E

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

[Filed June 14, 2002]

NUMBER	COMPLAINT DATE	HEARING DATE
GIC772552	08-15-01	06-14-02

HEARING TIME	DEPT.
03:00 PM	69

JUDGE/COMMISSIONER
HON. RONALD S. PRAGER

CLERK
CLARA BANKS

REPORTER
N/R
P.O. BOX 120128, SAN DIEGO, CA 92112-0128

PLAINTIFF/PETITIONER
AGNES BERNARDO, et al.

DEFENDANT/RESPONDENT
PLANNED PARENTHOOD FEDERATION OF A

ATTORNEY FOR PLAINTIFF/PETITIONER
STURART E. FAGAN

ATTORNEY FOR DEFENDANT/RESPONDENT
JAMES E. MCELROY (1)

1. DEFENDANT ATTY'S FEES/TELEPHONIC

The Court rules on defendants Planned Parenthood of America and Planned Parenthood of San Diego and Riverside Counties' (collectively, "Defendant") motion for attorney's fees under CCP section 425.16(c) as follows:

The Court grants the motion, as Defendant is entitled to an award of attorney's fees under 425.16(c).

Plaintiffs argue that the Court should not award attorney's fees because such an award in this case would be contrary to the purpose of the statute and would violate Plaintiffs' constitutional rights. Neither of these arguments has merit. First, the Court has no discretion as to whether or not to award attorney's fees against Plaintiffs given that Defendants prevailed on their ANTI-SLAPP motion, which renders such an award mandatory pursuant to CCP section 425.16 (c) (A prevailing defendant ... shall be entitled to recover his or her attorney's fees and costs.") (emphasis added); see also Ketchum v. Moses, 24 Cal.4th 1122, 1131 (2001). In addition, Plaintiffs' due process rights have not been violated since they received notice of this motion and opposed it. American Humane Association v. Los Angeles Times Communs., 92 Cal. App.4th 095 (2001).

As to the amount of the award itself, the Court agrees with Defendants that under the loadstar-adjustment method and taking into account the contingency risk taken by counsel for Defendants in agreeing to represent them, an enhancement or multiplier is called for.

The Court began its loadstar analysis by examining the compilation of time spent and the reasonable hourly compensation of each attorney involved in the presentation of the case. See Ketchum, supra, at 1132. In this regard, the Court further notes that Defendants filed numerous declarations showing that the billing rates of Defendants' attorneys were within those charged by equally competent attorneys in the community. See declarations of Shannon R. Nugent; Abby B. Silverman; Dara Klassel; Monty A. McIntyre; Stephanie Sontag and James E. McElroy. Church of Scientology v. Wollershein, 42 Cal. App.4th 628 (1996). In examining the billing records, the Court saw no "padding" in any form. Exhibits attached to Declaration of James E. McElroy. Therefore, the basic fee (specifically, $45,939.00)of Defendants' counsel seems fair and reasonable.

As noted above, however, the Court finds that a multiplier under the loadstar-adjustment method is called for in light of the novelty and difficulty of the questions involved, which the Court founds quiet complex in that they involved serious and highly debatable scientific issues and epidemiological medical evidence. In addition, a multiplier is also called for in light of the contingent nature of the fee award. Declaration of James E. McElroy, ¶ 5. In this Court's view (and especially given that Plaintiffs sought no damages in this case but only the infringement of Defendants' right to voice their views on the highly controversial issue of whether abortion increases a woman's chance of developing breast cancer), Defendants' counsel should be compensated for the risk they took in

defending Defendants' right to exercise their First Amendment right of freedom of speech on such a highly political issue. Ketchum, supra, at 1132-33.

Therefore, the Court multiplies the basic fee by a reasonable 1.75 to adequately compensate Defendants' counsel for the risk they took. Therefore the total amount of attorney's fees awarded is $77,835.25. In the Court's opinion, this amount reflects the fair market value of the services rendered. The Court notes that Defendants' counsel is not seeking a fee enhancement on the $3,411 in attorney's fees incurred after this Court rendered its decision. See Defendants' Supporting Memorandum, at page 8, footnote 1.

However, the Court notes that Defendants have presented no authority supporting the proposition that Plaintiffs' counsel should be held liable either solely or jointly and severally for the award, whether or not Plaintiffs are judgment proof. Therefore, Defendants' request that the Court impose the award on Plaintiffs' counsel is denied.

Should Plaintiffs wish to present oral argument, they shall file and serve with the Court by noon on June 18, 2002, a two-page letter brief (1)identifying the issues to be argued and (2) stating a -summary of the arguments to be presented on each issue. The opposing party shall file and serve by 4:00 p.m. on June 19, 2002, a two-page letter brief responding to the arguments. If the Court receives the letter brief requesting oral argument by the above deadline, oral argument is scheduled for June 21, 2002 at 1:15 p.m.

IT IS SO ORDERED.

APPENDIX F

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

[Filed March 18, 2002]

NUMBER	COMPLAINT DATE	HEARING DATE
GIC772552	08-15-01	03/18/02

HEARING TIME	DEPT
03:00 PM	69

JUDGE/COMMISSIONER	CLERK
HON. RONALD S. PRAGER	CLARA BANKS

REPORTER
N/R
P.O. BOX 120128, SAN DIEGO, CA 92112-0128

PLAINTIFF/PETITIONER
AGNES BERNARDO, et al.

DEFENDANT/RESPONDENT

PLANNED PARENTHOOD FEDERATION OF A

ATTORNEY FOR PLAINTIFF/PETITIONER
STUART E. FAGAN

ATTORNEY FOR DEFENDANT/RESPONDENT
JAMES E. MCELROY(1)

1. DEFENDANT SLAPP\TELEPHONIC

STATEMENT OF DECISION: The Court rules and provides this Statement of Decision on the motion to strike under CCP section 425.16 (strategic lawsuits against public participation or SLAPP) filed by defendants Planned Parenthood Federation of America (PPFA) and Planned Parenthood of San Diego and Riverside Counties (collectively, "Defendants") against the Complaint of Agens Bernardo, et al. (collectively, "Plaintiffs") as follows:

The Court grants themotion to strike and, consequently, dismisses the complaint with prejudice under CCP section 425.16,

CCP section 425.16.(b)(1) provides that:

> A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

To prevail on a SLAPP motion, the defendant must first show that the plaintiff's suit arises from the defendant's exercise of his or her right of free speech or right of petition in connection with a public issue (the first prong of the test). CCP § 425.16(b)(1); Dixon v. Superior Court, 30 Cal. App.4th 733, 742 (1994). Once the defendant makes that showing, the plaintiff must establish that he or she has a reasonable probability of prevailing on the claims (the second prong of the test). Id.; see, e.g., Dupont Merck Pharmaceutical Company v. Superior Court, 78 Cal. App.4th 562, 565-66 (2000).

The Court finds that Defendants have demonstrated that the instant lawsuit arises from Defendants' exercise of their right of free speech on a public issue, and have therefore met the first prong of the test.

This finding is based on the allegations asserted by Plaintiffs in their unverified Complaint that Defendants' acts and practices (specifically their publications/statements and/or alleged advertisements on their Internet websites (World Wide Web) regarding the issue of abortion) violate Business & Professions Code Section 17200, et seq. and section 17500, et seq. because the statements and alleged advertisements are "unlawful, unfair, confusing and misleading." Complaint, ¶ 23; see also Complaint, ¶¶ 1-22.

CCP section 425.16(e) provides that:

> As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: ... (3) any written or oral statement or writing made in a place open to the public

> or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest. (emphasis added)

In this regard, Plaintiffs do not argue in their Opposition Memorandum, that Defendants' websites are not public forums or that abortion is not a public issue. Therefore, there is no dispute that Defendants' websites constitute "writing[s] made in a place open to the public or a public forum," and constitute "conduct in furtherance of the exercise of the constitutional right of free speech," as Defendants' websites are open to the public and anyone with Internet access can visit them. There is also no dispute that the issue of abortion is one of the most highly charged public issues of our time. It is therefore proper for the Court to grant Defendants' request that the Court take judicial notice of the fact that abortion is a controversial issue. Evidence Code section 451(f). Indeed, issues regarding reproductive health have long been recognized as constituting matters of public interest entitled to First Amendment protection. Bigelow v. Virginia, 421 U.S. 809, 822 (1975).

Plaintiffs' contention is that Defendants have not satisfied the first prong of the test because their statements do no constitute "protected activity," as "only commercial speech which is 'truthful and nonmisleading' receives legal protection," citing case law. Plaintiffs' Memorandum of Points and Authorities in Opposition, at 2:13-16. This precise issue, however, was expressly addressed in DuPont, supra, where the court recognized that in making this argument, "plaintiffs are placing the cart before the horse." The court further noted that "[w]hether or not [the] statements are true should be

considered in the second part of the analysis .... " Dupont, 78 Cal. App.4th at 566. Therefore, Plaintiffs' argument that Defendants have not shown that their statements are "protected activity" is without merit. Defendants have met the first prong of the test.

With regard to the second prong, Plaintiffs bear the burden of establishing that there is a reasonable probability that they will prevail on the claims. In other words, Plaintiffs must present a sufficient prima facie showing of facts to sustain a favorable

judgment if the evidence they submitted is credited. Wilcox v. Superior Court, 27 Cal. App.4th 809, 823-24 (1994). In addition, "section 425.16 places an added burden on the plaintiff to meet the defendant's constitutional defenses." Id. at 824. This means that Plaintiffs must demonstrate that Defendants' purported constitutional defenses are not applicable as a matter of law or provide evidence of facts which, if accepted by a fact finder, would negate such defenses. Id.; Paul for Council v. Hanvecz, 85 Cal. App.4th 1356, 1367 (2001) (emphasis added). And while the Court is not allowed to weigh the evidence in determining this motion (Wilcox, 27 Cal. App.4th at 823), the "court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." CCP § 425.16(b)(2); see also Dixon v. Superior Court, 30 Cal.App.4th 733, 742 (1994).

In reviewing the pleadings, the Court notes that Plaintiffs' Complaint is entitled "Complaint for Injunctive Relief" and alleges two causes of action: the first under Business & Professions Code ("B&P") section 17200 et seq., and the second under B&P section 17500 et seq. (the "UCL"). As a remedy, Plaintiffs seek three injunctions: the first, to restrain Defendants from "making untrue or misleading statements ...

including the statements that abortion is safe and/or that it is safer than childbirth; the second, to restrain Defendants and their agents from performing abortions unless they provide certain information (specifically, information which states Plaintiffs' views and the views of their experts regarding induced abortions and the risk of cancer) prior to scheduling and/or accepting payment for abortion-related services; and the third, to require Defendants to provide a notice to patients who have received an abortion from doctors working at PPFA's affiliated clinics that they have an increased risk of developing cancer. Complaint, ¶¶ 1-3, at page 19-20.

In reviewing the nature of these injunctions, the Court cannot ignore that the first would result in a prior restraint of speech (which injunctions are generally impermissible, Paradise Hills Associates v. Procel, 235 Cal. App.3d 1528, 1539 (1991)), and that the last two constitute mandatory injunctions, which are very rarely granted, especially in the area of speech, as such injunctions may result in the violation of a defendant's First Amendment rights. U.S. Dep't of Agriculture v. United Foods. Inc., 121 S. Ct. 2334, 2338 ("The First Amendment may ... prevent the government from compelling individuals to express certain views"); Pacific Gas and Electric v. Public Utilities Comm'n of California, 475 U.S. 1, 7 (1986) (government may not compel a corporation to provide a forum for views with which it disagrees). Indeed, unlike prohibitory injunctions, mandatory injunctions are automatically stayed by the filing of an appeal, Kettenhofen v. Superior Court, 55 Cal.2d 189, 191 (1961).

Therefore, the Court must determine whether Plaintiffs have a reasonable probability of prevailing on their section 17200 and 17500 claims and thereby obtain the kinds of injunctions that they seek.

Plaintiffs argue that they have submitted a prima facie case supporting their causes of action under B&P sections 17200 et seq. and 17500 et seq. However, a careful review of the admissible evidence (see below) submitted by Plaintiffs shows otherwise.

With regard to Plaintiffs, claim that Defendants' websites are "unlawful" under section 17200 (see Complaint, ¶ 23), the Court notes that Plaintiffs have failed to state which statute, regulation or law (whether federal, State or common law) Defendants have allegedly violated. Plaintiffs have also failed to provide evidence showing any "unlawful" activity or practice. Therefore, the Court finds that Plaintiffs have failed to meet their burden of showing a probability of prevailing on their claims of "unlawfulness."

Plaintiffs have also failed to present sufficient evidence to establish a probability of prevailing on their claim that Defendants' websites constitute an "unfair" business practice under section 17200. With regard to the definition of"unfair" under the UCL, the Court notes that the law is unclear as to which definition of "unfair" applies in consumer cases post Celtech Communications, Inc. v. Los Angeles Cellular Telephone Company, 20 Cal.4th 163 (1999). See Schall v. The Hertz Corporation, 78 Cal.App.4th 1144, 1166-67 (2000) (stating that "any claims of unfairness under the UCL should be defined in connection with a legislatively declared policy"); But cf.Shvarts v. Budget Group, 81 Cal. App.4th 1153 (2000) (applying the "old" unfairness test). The "old" unfairness test appears to have two parts and requires the court to consider "the utility of Defendants' conduct against the gravity of the harm to the alleged victim" (Motors, Inc. v. Times Mirror Co., 102 Cal. App. 735, 740 (1980)), and/or to consider whether the alleged unfair practice "offends an established public policy "or is "immoral, unethical,

oppressive, unscrupulous or substantially injurious to consumers" (People v. Casa Blanca Convalescent Homes, Inc., 159 Cal.App.3d 509, 530 (1984)). With regard to the instant case, the Court finds that regardless of which test the Court applies, the result is the same: Defendants' practices and/or statements regarding abortion on their websites are not "unfair."

First, a review of the declaration of Plaintiffs' primary expert, Joel L. Brind, Ph.D. ("Dr. Brind") shows that, while he himself is a major proponent (if not the originator) of Plaintiffs' views (specifically, that induced abortions increase the risk of breast cancer in women (the "ABC Link")), Dr. Brind's declaration also shows that there is an on-going debate in the scientific community regarding this issue. His declaration, and those of Plaintiffs' other experts (Plaintiffs' Exhibits nos. 5 (at paragraph 16), 6 (at paragraphs 20-27), no. 7 (at paragraphs 23-25), no. 8 (at paragraphs 61-70), and no. 9 (at paragraphs 12-15)), also show that there are other experts in the field, who vehemently disagree with Dr. Brind's position. And while Dr. Brind and Plaintiffs' other experts attempt to discredit these experts' contrary opinions by openly criticizing and disagreeing with the data and scientific studies upon which these experts rely, the very fact that they recognize and discuss the contrary opinions in their declarations shows that the issue of whether induced abortions increase the risk of breast cancer is far from being a foregone scientific conclusion.

Indeed, while critical of the National Cancer Institute, one if not the most widely respected institutes championing the cause of curing cancer, Plaintiffs' own expert, Dr. Lanfranchi, acknowledges that position statement of the National Cancer Institute on this issue is contrary to her views. Plaintiffs' Exhibit 6 (Declaration of Angela Lanfranchi, M,D., ¶ 26).

Further still, another one of Plaintiffs' experts, Dr. Jose Bufill, provides evidence that there is a raging scientific debate on the issue, expressly stating that that "[tlwo schools define the scientific debate regarding the association of induced abortion with subsequent development of breast cancer" (emphasis added). Dr. Bufill then proceeds to discuss the groups' rationale for their positions. Plaintiffs' Exhibit 8 (Declaration of Jose Bufill, M.D., ¶ 61).

Thus, the Court need not even consider, much less weigh, the declarations of Defendants' experts on the ABC link issue in order to determine that it is a subject of heated debate among interested scientists everywhere.

Second, a fair review of the copies of Defendants' web pages that were submitted by Plaintiffs demonstrates that the information set forth therein on abortion, its risks and benefits, including the risk of breast cancer, are supported by references to scientific studies, which corroborate those very conclusions. For example, Plaintiffs have submitted a publication entitled "Anti-Choice Claims About Abortion and Breast Cancer," that appears on Defendants' websites. A review of this article shows that it is a comprehensive, historical review of the scientific literature on the issue of abortion and breast cancer.

While pointing out that "there is an absence of compelling evidence associating induced abortion with a woman's risk of developing breast cancer," Defendants state that "anti-choice extremists insist on making the connection anyway." Defendants then proceed to discuss the issue, noting that the association was first made in the 17th century "when breast cancer was noted to be more prevalent," and even discuss the basis of the theory linking pregnancy termination with breast cancer. Plaintiffs' Exhibit 10, at 000025. Further, while

Defendants' publication states that the studies on the link between abortion and breast cancer are "inconclusive," even this conclusion is supported by multiple references to nationally-recognized authorities, such as the National Cancer Institute, the American Cancer Society, and major universities. Exhibit 10, at 000026.

It therefore appears that Defendants have not failed to disclose that there are numerous studies that support Plaintiffs' position that induced abortions increase a woman's risk of breast cancer. Indeed, Defendants' publication includes a discussion of Dr. Brind's studies and those of others scientist who opine that there is such a link. Exhibit 10, at 000027. Defendants' websites even provide the citations to these studies, thereby enabling consumers to locate and read the studies for themselves.

The title to the last paragraph of the publication is also very telling. It states as follows: "The Planned Parenthood Position is that Abortion Poses No Demonstrated Health Risks," again referring to the link between induced abortion and breast cancer. Exhibit 10, at 000029 (emphasis added). In so doing, Defendants are clearly informing consumers that the position stated constitutes Defendants' opinion or position on the subject.

Plaintiffs nonetheless argue that Defendants' websites are deceptive for the reasons discussed by their experts (see Plaintiffs' Exhibits" nos. 4-9) and because Defendants' statements fail to recognize an undisputable medical fact, i.e., the protective effect against breast cancer that a full-term pregnancy provides. However, Plaintiffs themselves acknowledge that to the direct question of"[d]oes abortion cause breast cancer," Defendants' response is "No. But abortion does not offer the same protection against breast

cancer as a full term pregnancy." Plaintiffs' Surreply, at 1:8-10, citing Plaintiffs' Exhibit 10, at 00035; see also, Exhibit 10, at 000038. Therefore, contrary to Plaintiffs' argument, Defendants do acknowledge the protective effect which a full term pregnancy provides. However, that Defendants also do not believe abortion poses a health risk to women "because the research community has not reached a consensus on breast cancer and abortion," does not mean that Defendants' statements are "unfair," false, misleading or deceptive.

Plaintiffs argue that their claims arise from false and misleading statements of facts—not opinions. Among the challenged statements are the statements that "abortion is eleven times safer than carrying a pregnancy to term . . ." and that "abortion is about twice as safe as having your tonsils out and is safer than childbirth." Plaintiffs' Surreply at 1:1-7. However, Plaintiffs' basis for claiming that these statements are false is centered on the position that abortion causes breast cancer. Id. at 1:12-15 ("Plaintiffs have presented abundant evidence that the Defendants' statements of fact are false because induced abortion does cause breast cancer and, as a result, abortion is not safer than childbirth."). But, again, the Court cannot ignore Plaintiffs' own evidence, which undeniably shows that there are two camps of thought on this issue and that Defendants' statement that there is no consensus in the scientific community on this issue is supported by numerous scientific studies, and apparently by Plaintiffs' own experts. Plaintiffs' Exhibit 10, at 000030-32; Plaintiffs' Exhibit 8 (Declaration of Jose Bufill, M.D., ¶ 61).

In sum, without weighing any of the evidence, but rather focusing solely on Plaintiffs' evidence, the Court can only conclude that Defendants, acts and practices regarding their

statements on the risks and benefits of abortion vis-a-vis childbirth and the ABC Link are "fair," as opposed to "unfair," under the UCL. The statements do not offend any established policy that the Court is aware of, including a legislatively declared policy (see Schall, supra, possibly the "new" "unfairness" test), and Plaintiffs have not identified any such policy as the basis of their claim. In addition, taking Plaintiffs' evidence as a whole, the Court finds that Defendants' statements are not "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers" (People v. Casa Blanca Convalescent Homes, Inc., 159 Cal.App.3d 509, 530 (1984) (one of the "old" "unfairness" test)).

As to "the utility of Defendants' conduct against the gravity of the harm to the alleged victim," (the other "old" "unfairness" test, see Motors, Inc., supra), the Court notes that Defendants' websites provide useful information regarding abortion to consumers interested in terminating a pregnancy as well as information regarding reproductive health in general. Plaintiffs' Exhibit 10, at 0001, 0003-0008. Also significant is that Defendants' websites expressly provide that "[u]se of this site signifies your agreement to our terms of use and privacy statements." Plaintiffs' Exhibit 10, at 0001. And while Plaintiffs do not provide Defendants' terms of use, the Court may consider this evidence in determining whether Plaintiffs have a probability of prevailing, i.e., whether Plaintiffs' evidence negates Defendants' First Amendment defense of free speech. CCP § 425.16 (b)(2) (the "court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." CCP § 425.16(b)(2) (emphasis added); see also Dixon v. Superior Court, 30 Cal.App.4th 733,742 (1994)).

Defendants terms and conditions of use provide as follows: "Planned Parenthood Federation of America is pleased toprovide you with the resources on this site for your personal education, but nothing on this Site constitutes a recommendation for medical care, nor does PPFA make a warranty of any kind in terms of their appropriateness for individual on-line users." Defendants' Exhibit 2 (emphasis added). A visitor to Defendants' Websites therefore agrees that their use of the site is for educational purposes only and the websites, as discussed above, do provide a wealth of information on a variety of reproductive-health issues, including references to articles and publications which disagree with Defendants, stated position on the issue of the health risks of abortion. In light of this, the Court finds that, in considering "the gravity of the harm to the alleged victim," Defendants' websites are not an "unfair" practice or act, as the gravity of the harm, if any, is slight, and the users of the websites can hardly be characterized as "alleged victim(s)."

Moreover, Defendants' argument regarding causation is also well taken. Defendants argue that there is no casual link between Defendants' websites and any harm to its visitors because all visitors to Defendants' websites must see a physician before they can obtain an abortion, and because the physician has a duty to inform his patients of the risks involved in any procedure, including abortion. Defendants are correct. Arato v. Avedon, 5 Cal.4th 1172, 1191 (1993) ("A physician ... evaluates the patient's ..... decisional needs against a background of professional understanding that includes a knowledge of what information beyond the significant risks associated with a given treatment would be regarded by the medical community as appropriate for disclosure under the circumstances."). In fact, Plaintiffs' evidence shows that Defendants recognize that visitors interested in treatments or procedures relating to reproductive

health must see a physician to obtain the procedure and answers to their medical questions. Plaintiffs' Exhibit 10, at 00015 ("For medical questions, or to schedule an appointment ...."), and at 000021 ("Ask a Clinician, Make an appointment" (underscoring indicating a web (hyper) link).

In sum, this case is not an "ordinary" consumer case, as visitors cannot simply purchase an abortion by pushing a virtual button and supplying their credit card number. There is a significant intervening factor involved, i.e. the patient's doctor. Further, the fact that Defendants make it easy for the visitor to make an appointment witha doctor through one of their affiliated clinics by providing an "800", telephone number or a web (hyper) link, or even location information to PPFA's affiliates is itself further evidence that visitors to Defendants' websites are not immediately and necessarily "victimized" by their exposure to the information on abortion presented in Defendants' websites.

Neither are Defendants' practices and/or statements false, deceptive or misleading under the UCL's third prong ("fraudulent business practice"). In order to prevail on this claim, Plaintiffs must present evidence of fraudulent conduct by Defendants, which is likely to deceive members of the public. Bank of West v. Superior Court, 2 Cal.4th 1254, 1267 (1992). Plaintiffs have failed to present evidence that Defendants' statements are deceptive and misleading, when Defendants' websites expressly acknowledge the protective effect of full term pregnancies, discuss the theory of the possible link between abortion and breast cancer and go as far as providing the visitor with the necessary information to further research that position. Had Defendants' websites failed to mention Dr. Brind's studies and those of like-minded scientists, then perhaps Plaintiffs' position would have more merit. But, Plaintiffs' very evidence shows that Defendants

have not hidden the contrary position, but only that Defendants present arguments criticizing the results of the studies postulating the ABC Link, and consequently questioning their validity. See, e.g., Day v. AT&T Corp., 63 Cal. App. 4th 325, 332 (1998) ("A perfectly true statement couched in such a manner that is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information is actionable ....") (emphasis added). Here, in contrast, Defendants did not fail to disclose any of the relevant information.

In sum, Defendants' criticisms of Dr. Brind's studies and those of others advocating the existence of the ABC Link represent the very kind of rigorous debate on issues of public concern that the First Amendment was designed to foster and protect. Plainly put, Defendants are completely within their First Amendment right of free speech to express a position or state views on scientific issues that currently form the subject of heated debate in the community, especially when the position being expressed is supported by numerous published studies specifically addressing the point, and such highly regarded institutes, such as the National Cancer Institute. Plaintiffs' Exhibit 10, at 00018, 000030. Indeed, a review of Dr. Brind's declaration shows that he too exercises his First Amendment right of expressing critical views on studies whose results are contrary to his own (Declaration of Joel L. Brind, Ph.D., Plaintiffs' Exhibit 4, ¶¶ 25-27) and upon which Defendants rely in concluding that the theory of induced abortion and breast cancer "has not been borne out by research." Plaintiffs' Exhibit 10, at 000029.

In sum, while Plaintiffs insist that their complaint is based on Defendants' "false and misleading statements of facts," the basis of this claim is Defendants' refusal to accept as true the position that an induced abortion "causes" breast cancer.

Plaintiffs' Surreply in Opposition, at 11-14. However, even Dr. Brind does not go as far-as to state that a causal link has been conclusively proven, but simply that the evidence, in his opinion, is "overwhelming." Declaration of Joel L. Brind, Ph.D., Plaintiffs' Exhibit 4, ¶ 40. Moreover, the Court cannot ignore the numerous expert declarations submitted by Defendants' experts who disagree with Dr. Brind, and while the Court has not weighed this evidence, these declarations also underscore the existence of an ongoing scientific debate on this subject. See Supplemental Declaration of Polly A. Newcomb, Ph.D., ¶¶ 1-3.

Lastly, with regard to Plaintiffs' claims of false advertising under both sections 17200 and 17500 et seq., the Court finds that Plaintiffs have not shown a probability of prevailing on these claims either. To prevail, Plaintiffs must present evidence that members of the public are likely to be deceived by Defendants' statements. Committee on Children's Television v. General FoodsCorp, 35 Cal.3d 197. 211 (1983). But, again, Plaintiffs' evidence does not show a probability of such deception.

First, with regard to the definition of "advertisement," the Court recognizes that it is very broad such that virtually any statement made in connection with the sale of a product or service is "advertisement." Recently, however, the California Supreme Court stated that most published opinions have interpreted advertising" to require "widespread promotional activities directed to the public at large" Bank of West v. Superior Court, 2 Cal.4th 1254, 1276-1277 n.9 (1992).

Plaintiffs allege that Defendants' statements about abortion constitute "advertisement" primarily because "[a]cess to the location of health centers and to sexual health information is provided on virtually every page, including the pages

containing Defendants' statements about the safety of abortion ...." Plaintiffs further argue that "PPFA's role in the delivery of services via "Planned Parenthood" clinics follows from its nature as a 'federation' of affiliated clinics. Plaintiffsthereafter describe Defendants' websites as "thoroughgoing marketing system" such that "[t]here is no question that the Defendants' statements are made in connection with their offer of abortion services." Plaintiffs' Memorandum in Opposition, at 7-8.

In this regard, the Court finds that Defendants' statements (Plaintiffs' Exhibit 10 (copies of Defendants' web pages)) cannot be construed as pure commercial speech or pure advertisement. For example, page 00001 of Plaintiffs' Exhibit 10 shows that Defendants expressly request both monetary ("Support Planned Parenthood DONATE ONLINE") and political ("Sign the Petition for Choice") support for their position on abortion. Further, as noted above, Defendants' visitors agree to their terms of use, which expressly state the websites are for educational purposes only. The publication stating Defendants' view on the issue of whether there is conclusive evidence showing the ABC Link is in the form of an educational article, which ostensiblyreviews the scientific literature onthe subject. In fact, Defendants' websites contain numerous informative articles or "fact sheets" on a broad spectrum of reproductive health issues as well as their attendant legal issues. Plaintiffs' Exhibit 10, at 00007.

Further, according to Plaintiffs themselves, eventhe short statements about the safety of abortion upon which Plaintiffs have predicated their complaint constitute "statements of facts." Plaintiffs' Surreply, at 1. But, while statements of fact can be used as or in "advertisements," in light of the political and educational context of Defendants' websites, the Court finds that Defendants' statements are not made in connection with an offer to sell abortion services, are not "promotional"

of abortion and/or do not propose a "commercial transaction." See Bank of the West, supra; Board of Trustees of the State Univ. of New York v. Fox, 492 U.S. 469 (1989). Rather, Defendants' statements strike the Court as being educational and/or informative in nature, as opposed to advocating and or "advertising" (in the sense of inducing or offering a financial transaction) abortion services.

The fact that Defendants' websites also contain web (hyper) links to other sites, "800" telephone numbers and location information regarding their affiliate clinics that do provide abortion services does not automatically transform Defendants' statements into abortion "advertisement."

But, even accepting for purposes of argument, that Defendants' websites do contain advertisement regarding abortion services, the Court finds that Defendants' statements have both commercial and noncommercial aspects such that they must be treated as fully protected under the First Amendment. Riley v. National Federation of the Blind, 487 U.S. 781,795-96 (1988);

Moreover, even if the Court were to conclude that Defendants' statements are pure commercial speech, the Court finds that the purported advertisements are not false, misleading or deceptive for the reasons noted above. Lastly, Plaintiffs have not shown a probability that they will prevail and prove that the public is likely to be deceived by Defendants' statements given Defendants' terms of use as educational (see above). Further, the fact that visitors of Defendants' websites must see a doctor, who is required to obtain their informed consent, before performing any abortion procedure, makes it unlikely that the patients willbe deceived.

Therefore, giving full weight and credit to Plaintiffs' evidence, the Court finds that Plaintiffs have not demonstrated that Defendants' purported constitutional defenses are not applicable as a matter of law or provide evidence of facts which, if accepted by a fact finder, would negate such defenses. Wilcox v. Superior Court, 27 Cal. App.4th 809, 823-24 (1994); Paul for Council v. Hanyecz, 85 Cal. App.4th 1356, 1367 (2001) (emphasis added).

Lastly, the Court notes that Plaintiffs have not shown a probability of prevailing on obtaining the specific injunctions that they seek, in particular the mandatory injunctions. This is because were the Court to force Defendants to make the statements Plaintiffs propose and/or to provide notice to patients of doctorsaffiliated with PPFA of the alleged increase of risk cancer associated with abortion (see Plaintiffs' Complaint, prayer for relief, ¶¶ 1-3, at pages 19-20), the Court is likely to interfere with the doctor/patient relationship in view of the standard of care in the Southern California community regarding abortion.

Defendants have presented the declarations of various well-recognized physicians in the County of San Diego, who opine that the standard of care in California is not to inform patients of the alleged link between abortion and breast cancer. Declaration of David B. Preskill, M.D., ¶ 8 ("[I]t is my professional medical opinion that the applicable standard of care in the Southern California medical community is not to tell an abortion candidate that there is an increased risk of breast cancer as a result of an elective procedure. To inform a patient that such a risk exists, as part of the informed consent process, might unduly alarm the patient, unnecessarily distress an already anxious patient and would quite simply be inaccurate."); see also Declaration of Steven Drosman, M.D., ¶ 9.

Plaintiffs have offered contrary expert declarations, but a close reading of these declarations show that these experts do not directly state that the standard of care in Southern California is to inform patients about the alleged increased cancer risk. For example, one of Plaintiffs' experts simply states her opinion that "whether a given risk must be disclosed should not be determined by the custom in the medical community but by the known medical literature and the patients' right to self-determination." Declaration of Angela Lanfranchi, M.D., ¶ 24. In addition, Defendants' objections to the declarations of Plaintiffs' experts, namely Joel L. Brind, Ph.D., Chris Kahlenborn, M.D., Angela Lanfranchi, M.D., Elizabeth Shadigian, M.D., Jose Bufill, M.D., Jane Anderson, M.D., and Elizabeth Shadigian, M.D. are sustained regarding their statements on the standard of care regarding abortion information in the Southern California community.

Defendants object to these declarations on the grounds that the doctors do not perform abortions and do not practice medicine in Southern California such that they are not qualified to opine on the standard of care in Southern California regarding informed consent from a patient seeking abortion. In this regard, the Court notes that Dr. Brind is not a medical doctor, but a biologist (Decl., ¶ 2), Dr. Kahlenborn practices internal medicine, not gynecology (Decl., ¶ 2), Dr. Lanfranchi is a surgeon and family practitioner (Decl., ¶ 2), Dr. Bufill is an oncologist and hematologist (Decl., ¶¶ 3-4), Dr. Anderson is a pediatrician (Decl., ¶ 2), and while Dr. Shadigian is a gynecologist, she does not state that she provides abortion services.

Therefore, given the lack of contrary evidence, the Court must conclude that the standard of care in Southern California is not to provide the information on abortion and cancer that

Plaintiffs' injunctions seek. Further, putting aside the issue that mandatory injunctions (especially in the area of speech) are seldom, if ever, granted (see above), were the Court to issue Plaintiffs' injunctions, it would, in effect, result in judicial intervention in the doctor/patient relationship. Issuing the injunctions would also place the Court in the questionable position of requiring the dissemination of one-sided information on this highly controversial issue, which may run contrary to the information actually givento individual patients by their physicians based on the patients' decisional needs, and in so doing, may cause harm to the patients. Arato v. Avedon, 5 Cal.4th 1172, 1191 (1993) ("A physician ... evaluates the patient's decisional needs against a background of professional understanding that includes a knowledge of what information beyond the significant risks associated with a given treatment would be regarded by the medical community as appropriate for disclosure under the circumstances.")(emphasis added).

Lastly, the Court notes that it appears that Plaintiffs are attempting to obtain through this lawsuit what they have sought through the political process, i.e., a legal requirement that patients seeking abortion be told that an abortion will increase their risk for breast cancer. See Plaintiffs' Exhibit 10 at ("Anti-abortion foes are also lobbying for legislation that would require telling women who are considering abortion that having one wouldplace them at in [sic] increased risk for breast cancer (Querido, 1999)."). However, the Court is not a legislative body and cannot and will not legislate from the bench; judicial restraint, especially with regard to such a highly charged public issue as abortion, is absolutely necessary to ensure that the judicial system is not misused for political ends. CCP § 425.16 (a) (the Legislature has declared that "it is in the public interest to encourage continued participation in matters of public significance, and that this

participation should not be chilled through abuse of the judicial process.") CCP § 425.16 (a) (emphasis added).

Therefore, it is highly unlikely for all the above reasons that Plaintiffs will prevail and that this Court will issue the specific injunctions Plaintiffs seek. Consequently, the Court strikes Plaintiffs' Complaint under CCP section 425.16 and dismisses the action with prejudice.

Should Plaintiffs wish to present oral argument, they shall file and serve with the Court by 4:00 p.m. on March 20, 2002, a two-page letter brief (i) identifying the issues to be argued and(2) stating a summary of the arguments to be presented on each issue. The opposing party shall file and serve by 4:00 p.m. on March 21, 2002, a two-page letter brief responding to the arguments. If the Court receives the letter brief requesting oral argument by the above deadline, oral argument is scheduled for March 29, 2002 at 1:15 p.m.

IT IS SO ORDERED.

Dated: 03/18/02

/s/
JUDGE/COMMISSIONER OF THE SUPERIOR COURT

APPENDIX G

CODE OF CIVIL PROCEDURE
PART 2. Civil Actions
TITLE 6. Pleadings in Civil Actions
CHAPTER 2. Pleadings Demanding Relief
ARTICLE 1. General Provisions

Cal Code Civ Proc § 425.16 (2004)

§ 425.16. Legislative findings; Special motion to strike action arising from "act in furtherance of person's right of petition or free speech under United States or California Constitution in connection with a public issue"

(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b)(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination.

(c) In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with

an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be noticed for hearing not more than 30 days after service unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."

(i) On or before January 1, 1998, the Judicial Council shall report to the Legislature on the frequency and outcome of special motions made pursuant to this section, and on any other matters pertinent to the purposes of this section.

(j) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(k)(1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing,

transmit to the Judicial Council, by e-mail or fax, a copy of the endorsed-filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.

HISTORY:

Added Stats 1992 ch 726 § 2 (SB 1264). Amended Stats 1993 ch 1239 § 1 (SB 9).

Amended Stats 1997 ch 271 § 1 (SB 1296); Stats 1999 ch 960 § 1 (AB 1675), effective October 10, 1999.

BUSINESS & PROFESSIONS CODE
DIVISION 7. General Business Regulations
PART 2. Preservation and Regulation of Competition
CHAPTER 5. Enforcement

Cal Bus & Prof Code § 17200 (2004)

§ 17200. Definition

As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

HISTORY:

Added Stats 1977 ch 299 § 1.
Amended Stats 1992 ch 430 § 2 (SB 1586).

BUSINESS & PROFESSIONS CODE
DIVISION 7. General Business Regulations
PART 3. Representations to the Public
CHAPTER 1. Advertising
ARTICLE 1. False Advertising in General

Cal Bus & Prof Code § 17500 (2004)

§ 17500. False or misleading statements generally

It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement, concerning that real or personal property or those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell that personal property or those services, professional or otherwise, so advertised at the price stated therein, or as so advertised. Any violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or

by a fine not exceeding two thousand five hundred dollars ($2,500), or by both that imprisonment and fine.

HISTORY:
Added Stats 1941 ch 63 § 1.
Amended Stats 1955 ch 1358 § 1; Stats 1976 ch 1125 § 4; Stats 1979 ch 492 § 1; Stats 1998 ch 599 § 2.5 (SB 597).